THE
INDIAN CONSTITUTION

K. VENKOBA RAO, M.L.

A. C. NANJAPPA

THE
INDIAN CONSTITUTION

(Being an outline of the law, history and custom of the Constitution and a commentary on the Government of India Act, 1935)

With full notes, extracts from documents, and appendices on India Office, Indian States and Fundamental Rights

(With a Foreword by Sir Ivor Jennings, Litt.D., LL.D., Vice-Chancellor, University of Ceylon)

BY

K. VENKOBA RAO, M.L.

Author of 'Indian Companies Act' Etc.

THE
MADRAS PUBLISHING HOUSE (1945) LIMITED
MOUNT ROAD, MADRAS
1948

All rights reserved by the Author

[*Price Rs. 8*

PRINTED AT THE
MADRAS PUBLISHING HOUSE (1945) LTD.
MOUNT ROAD, MADRAS 2

FOREWORD

By

Sir Ivor Jennings, Litt.D., LL.D.

Vice-Chancellor, University of Ceylon

———:o:———

In the long history of India the British occupation will appear as a short interlude; and yet in one respect, at least, its consequences will be evident almost to the end of time. The British are by tradition makers of constitutions and givers of laws. Their pragmatic approach to political and social problems enables them to create legal institutions which, whatever be their defects in theory, seem somehow to work themselves out in practice. Parliamentary government may be rationalised by the political scientist but he could never have thought it out in theory. Cabinet government, like Topsy, ''just growed''. Federalism of the American type was not expounded in the books; it was worked out by a group of revolted British subjects who had a practical problem to solve. Dominion Status might be described in Viscount Birkenhead's words (in a different context) as ''a model of prevarication'', and yet it works. As in the greater problems so in the less; there is a solution to every difficulty if one can only find the formula.

need, finally, a detailed knowledge of the Indian Constitution itself, whether it be the interim Constitution based on the Government of India Act, 1935, or the Constitution elaborated by the Constituent Assembly.

The requirements sound like the recital in Kipling's *"If"*, but it will be a magnificent education and, what is more, an education which will pay magnificent dividends, for the one certain conclusion to be drawn from the deliberations of the Constituent Assembly at New Delhi is that in the new India the functions of the constitutional lawyer will be exalted. We trust that his fees will be placed at a correspondingly high level. The more numerous the "Fundamental Liberties" the more briefs for constitutional lawyers.

Clearly a new technique of teaching must be developed in the Law Schools of India, and Mr. Venkoba Rao must be congratulated on beginning the process of experimentation while the transitional Constitution is still in operation. It would be improper for one who has no qualification to lecture Indians on their own institutions, and who sees the Union through the clouds that add embroidery to the fair Isle of Lanka,

to express any view on the extent to which it has succeeded. He has clearly brought in a wide range of reading and has drawn examples from all the Constitutions of the English-speaking countries. He has thus provided ample material for a deep and comprehensive examination of the present Constitution.

PREFACE

I CONFESS that it was with some hesitation and diffidence that I took up the task of writing on the Indian Constitution with the new Constitution practically knocking at the door. I can only plead the following three extenuating circumstances in mitigation of my offence : Firstly, compared with other statutes, the changes made in the Government of India Act, 1935 during the past fifteen months represent a record in the matter of constitutional amendment. And even at the moment of writing it is understood that the Deputy Prime Minister of India will introduce into the Constituent Assembly a bill to provide for various matters like administration of Indian States which have merged with adjoining provinces, setting up of Appellate Industrial Tribunals, amending S. 126-A, and lastly clothing the Central Legislature with adequate powers to implement effectively the Government's industrial policy which has been accepted by the Constituent Assembly sitting as the legislature. I thought that making our friend the 1935 Act recognisable to the public was a good piece of work because they would be hard put to effectively keep pace with the lightning changes made in this Act which is our fundamental constitutional document during the transitional period. Secondly, during the past eleven years a large mass of case-law on the interpretation of the Act has accumulated, and so far as I am aware, it has not been systematically and completely dealt with anywhere. Thirdly, we all owe a deep debt of gratitude to the Drafting Committee whose vision, wisdom, and far-sightedness have been instrumental in preserving for us the amiable features of the 1935 Act. Hence I fervently hope that many parts of the present work will continue to retain their relevance, usefulness, and appropriateness even when the Draft is passed into law.

I have devoted particular attention to the constitutional laws of the United Kingdom, and of the British Empire federations, namely Canada and Australia. Without some knowledge of the latter many of the provisions of the 1935 Act would be quite meaningless and unintelligible. Indian Constitutional history from the time of the grant of the first charter to the East India Company to trade

with India, up to the historic 15th August 1947 has been sketched and particularly the hectic political activity of the formula-fertile period from 1940 onwards. I have discussed Fundamental Rights in Appendix C because increasing importance is attached in recent constitutions to these rights, and incidentally I have referred to some recent constitutions like those of Burma, China, Italy, Japan etc. Indian States have also been dealt with in Appendix B especially in the light of the situation created by the lapse of paramountcy consequent on the unpractical legalism which inspired the Cabinet Mission Proposals and the Independence Act in respect of this matter. The process by which these picturesque feudal anachronisms have been converted into free and democratic units of the Indian Union has been traced with all the relevant data. My aim throughout the book has been to give some idea as to how India is governed and if I have succeeded in that aim I shall consider it a sufficient recompense for my labours.

I am grateful to Sir Ivor Jennings, Vice-Chancellor, University of Ceylon for kindly consenting to write the Foreword. My thanks are due to the Madras Publishing House (1945) Ltd., for the neat execution of the work. Suggestions for enhancing the usefulness of the book will always be thankfully received by me.

Madras,
December, 1948.

THE AUTHOR.

CONTENTS

			PAGE
CHAPTER	I.	Introductory	1
CHAPTER	II.	The Federal Executive ...	31
CHAPTER	III.	The Federal Legislature ...	36
CHAPTER	IV.	The Federal Court ...	44
CHAPTER	V.	The Federal Railway Authority	53
CHAPTER	VI.	The Provincial Executive ...	60
CHAPTER	VII.	The Provincial Legislature ...	65
CHAPTER	VIII.	Chief Commissioners' Provinces, etc.	69
CHAPTER	IX.	Provincial Judiciary ...	75
CHAPTER	X.	Distribution of Legislative Powers	96
CHAPTER	XI.	Administrative relations between the Federation and the Units	115
CHAPTER	XII.	Distribution of Revenues, etc.	120
CHAPTER	XIII.	The Services of the Crown in India	142
CHAPTER	XIV.	Miscellaneous Provisions ...	168
APPENDIX	A.	India Office	189
APPENDIX	B.	Indian States	192
APPENDIX	C.	Fundamental Rights ...	199

The Indian Constitution

CHAPTER I

Introductory [1]

I. Definition and Sources of Constitutional Law : Any study of the subject of Constitutional Law will not be complete unless the term " Law " is explained firstly without, and later with the addition of the adjective " constitutional". Positive Law or Law in the Austinian sense is a command issued by a sovereign or political superior to a political inferior the disobedience of which is visited with penalties. Law in the lawyer's sense thus differs from religion, morality and fashion whose rules also are commonly and loosely spoken of as " laws ". Constitutional Law deals with the distribution and exercise of the functions of Government and the relation of the Government authorities to each other and to the individual in his character of a citizen or subject. The sources of Constitutional Law are four in number, namely (*a*) Statute Law, (*b*) Case Law, (*c*) Custom or Convention, (*d*) Prerogative. In the case of the United Kingdom much of its Constitutional Law has its origin in custom and there are only a few statutes like the Habeas Corpus Acts dealing with matters of Constitutional Law. The Constitutional Law of the United States, on the other hand, is for the most part statutory in character. The interpretation put by judges on the constitution is also a source of Constitutional Law. The English constitution abounds in conventions which are " rules of political practice which are regarded as binding by those to whom they apply but which are not laws as the Courts would not enforce them if the matter came before them." [1a]

---

1. [*Note.*—It is proposed to provide through the medium of this chapter some background against which alone an intelligent and purposeful study of the Government of India Act, 1935, is possible. The 1935 Act is based to some extent on the corresponding provisions contained in other Dominion constitutions and hence some reference to such well known doctrines as the " pith and substance " doctrine, the doctrine of " occupied field " etc., is inevitable. Some account of the various kinds of constitutions as also of the exact connotation of that much misused word " Dominion Status " is proposed to be given. The principles applicable to the interpretation of constitutions, the historical evolution of the Indian Constitution and the sources of Constitutional Law are the remaining topics dealt with.]

1a. The following examples among others of constitutional conventions are given by Chalmers & Hood Phillips "*Constitutional Laws of Great Britain etc.*" 6th edn., pp. 33–41. (i) The King must invite the most influential leader of the party commanding a majority of the House of Commons to form a ministry. (ii) The ministry are collectively responsible to Parliament. (iii) A ministry should not advise the Crown to declare war or make peace without the approval of the House of Commons. (iv) In cases of conflict the House of Lords should yield to the House of Commons. (v) Peers who do not hold high judicial office do not attend when the House of Lords is sitting as a Court.

The following are some examples of conventions established in the Dominions : (i) A bilateral treaty imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part. (ii) A Governor-General should normally grant a dissolution to a party which is placed in a minority and wants to appeal to the electorate. (iii) The Governor-General is appointed on the advice of the ministry of the Dominion concerned. Examples of conventions which operated under the Indian Constitution are :—(i) The Fiscal Autonomy Convention which lays down that in matters of tariff arrangements when the Government of India and the Indian Legislature are in agreement the Secretary of State for India should not interfere except to safeguard the international obligations of the Empire.[2] (ii) The assurance that the various Congress Provincial Premiers got from the Governors in 1937 that in the day-to-day administration they would not use the special powers which were given to them by the 1935 Act, thus in effect making the relevant provisions of the 1935 Act a nullity.

Prerogative means " those rights and capacities which the King enjoys alone in contradistinction to others and not those which he enjoys in common with any of his subjects." It is the " residue of discretional or arbitrary authority which is legally left in the hands of the Crown."[3]

II. Classification of Constitutions : Constitutions are divided into written and unwritten constitutions, unitary and federal constitutions and rigid and flexible constitutions. The classification of constitutions into those which are written and those which are not, presents little difficulty. The second mode of classification requires some notice. The definition of a federal state by Sir Robert Garran quoted by the *Report of the Royal Commission on the Australian Constitution* (at page 230) as a ' form of government in which sovereignty or political power is divided between the Central and Local Governments so that each of them is within its own sphere independent of the other ' is quite accurate. A federal system presupposes the existence of four factors : (*a*) a written constitution ; (*b*) supremacy of the constitution over all powers ; (*c*) division of powers between the central authority and the constituent units ; (*d*) judicial machinery to interpret and guard

---

2. See the report of Joint Select Committee on the Government of India Bill, 1919.

3. Examples are :—(i) The immunity of the Crown from legal proceedings. (This has been abrogated considerably by the recent English Crown Proceedings Act 1947 (10 & 11 Geo. VI and 11 Geo. VI, C. 44). See chapter 12 *post.* (ii) The King is not bound by statute unless expressly named therein. See *R.* v. *Kent Justices* (1890) 24 Q.B.D. 181. (iii) The power of pardon. (iv) Ownership by Crown of wrecks i.e. a ship from which no human being or living creature has escaped alive. (v) Treasure trove, mines and estate of a person who dies without heirs belong to the Crown.

the constitution. In unitary constitutions, on the other hand, supreme political power is vested in a single authority and if some portion of it is transferred to others it is only for the sake of convenience and by way of delegation and does not impair the sovereignty of the former. A federation has to be distinguished from a confederation and a personal union. A confederation involves a loose alliance between a number of sovereign political communities for certain common ends. The states under a confederation continue to preserve their sovereignty as well as their individuality though they band themselves together for certain common purposes. For the fulfilment of these common purposes they agree upon joint consultation and action through the form of treaties of international character but there is never the creation of a distinct central state. The difference between a federation and a confederation is well brought out by the two German words *Bundesstaat* and *Staatenbund* denoting the former and the latter respectively. Another difference is that in the case of a federation the component units have no international status while in the case of the latter they have. So the essence of a confederation is a delegation and not a surrender of certain powers to a central authority. A federation and a confederation have to be distinguished from a personal union. A personal union implies nothing more than the fact that the same King rules over the two countries.

Though the main idea underlying federalism is what we have noted above, particular departures from it may be permissible according to the requirements of local circumstances without detracting from the main idea. But certain remarks of Lord Haldane in an Australian appeal before the Judicial Committee, *Attorney General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ltd.*[4] seem to throw doubts on the above proposition. The matter is one of academic interest but nevertheless it will not be out of place to quote the words of the noble Lord. Postulating the theory that the Australian constitution was a true federation and that the Canadian one was not, his Lordship observed:

> 'The Provinces (in Canada) were created *de novo*. They did not come together and make a federal arrangement under which they retained their existing powers and parted with certain of them and an Imperial statute has got to ratify the bargain; on the contrary the whole vitality and ambit of the Canadian constitution was a surrender if you like first, and then devolution The meaning of a federal government is that a number of states come together and put certain of their powers into common custody and that is the federal constitution in Australia but in Canada not at all..... In Canada the provinces were to have fresh and much restricted constitutions. The Canadian Act departs widely from the true federal model adopted in the constitution of the United States, the tenth amendment to which declares that the powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively, or their people.'

---

4. (1914) A.C. 237.

The fact that in the Canadian constitution the residuary powers have been thought to be vested in the Federation instead of in the states would appear to distinguish it from a truly federal government. For one thing, this is to confuse the history of the process of federation with the federal idea itself; for another thing the residuary powers given to the Centre have been rendered ephemeral by judicial interpretation put on the constitution and practically the states enjoy full residuary powers. But there are certain peculiarities in Canadian federalism which it would be unwise to ignore. First, the Dominion ministry advise the Governor-General as to the appointment of provincial Lieutenant-Governors. Again the Governor-General on the advice of the Dominion ministry can disallow provincial Acts.[4a]

We shall now pass on to a consideration of the division of constitutions into rigid and flexible, or as it is sometimes put, into controlled and uncontrolled constitutions. Constitutions are rigid or flexible according to the ease or difficulty with which amendments may be made. The power to make amendments is called the constituent power. The constitution of the United States is said to be rigid because the process of amendment is more elaborate and difficult than in any other country. Amendments have to be proposed by a twothirds majority of both houses of Congress, or by a convention approved by the legislatures of twothirds of the states, and have to be ratified by at least threefourths of the legislatures of the states. The constitutions of the United Kingdom and Hungary are termed flexible because they can be amended by the ordinary process of lawmaking. There are constitutions which fall into a class between the two, namely, those where amendment is by a special procedure which is more difficult than the ordinary process of lawmaking, but is nevertheless within the competence of the national legislature and does not require the participation of outside authorities, like the constitutions of Germany, Austria and France.

The British North America Act 1867 does not contain any express provisions as to amendment of the same and hence presumably any such amendment can only be made by the Imperial Parliament with the concurrence of the Dominion and the states.[4b] By S. 128 of the Australian Constitution Act of 1900 any alteration is valid if it is passed by an absolute majority of both Houses of the Commonwealth Parliament and is approved by a majority of electors (qualified to vote for the election of members to the House of Representatives)

4a. See Greenwood "*Future of Australian Federalism*" (1946) who takes a pessimistic view of the future of Federalism.

4b. There is a convention that the British Parliament will pass legislation amending the British North America Acts 1867 to 1930 if requested to do so by the Dominion provided that where provincial rights are affected the assent of all Provincial Governments has been previously obtained by the Dominion.

in a majority of states, and a majority of all the electors. By S. 152 of the Union of South Africa Act, 1909 it is provided that neither that section nor the sections of the Act relating to the number of members to be elected from the provinces to the House of Assembly, the qualifications of electors, or the official languages of the Union, shall be amended or repealed except by a twothirds majority of both Houses of Parliament sitting together. In the case of the Irish Free State the Constitution of 1922 rested on the Treaty of December 1921 between Great Britain and Ireland. The Irish Parliament converted itself into a Constituent Assembly and enacted the Constitution of 1922. One of the terms of that Constitution is that amendments to it can be made only within the Treaty of 1921. The Treaty itself provided by one of its clauses that the constitutional relationship between the Irish Free State and Great Britain should be the same as that between the latter and Canada. The Irish Government repealed first the clause in the Constitution which said that amendments must be made only within the Treaty of 1921 and later abolished the right of appeal to the Privy Council by way of special leave. The validity of this was in issue in the case of *Moore* v. *Attorney-General for Irish Free State*.[5] In that case the Privy Council held that the Statute of Westminster gave the Irish Free State full power to enact any Act repugnant to an Act of the Parliament of the United Kingdom and repealing the same, that the Constitution Act of 1922 was no exception to this since it was like any other Act of the Imperial Parliament, and that therefore even amendments of the Constitution beyond the Treaty were valid provided the Treaty itself was not abrogated. The new Constitution of Eire which came into force in December 1937 avoids all reference to the Treaty.

The Statute of Westminster gives power to the Dominion Parliaments to enact laws inconsistent with Acts of the Imperial Parliament and repealing the same. Does this power extend to amending the Constitution Act itself which is also an Act of the Imperial Parliament? In the case of Canada, Australia, and New Zealand it does not. But the case of the South African Union is different. There is no saving made in its case as to the Constitution Act and it can repeal or alter S. 152 or any of the other sections mentioned in that section without following the special procedure laid down by that section. But even though it has the legal power to do so, South African statesmen have given out that they will respect the obligations of that section on a moral basis. About the constituent powers of the Irish Free State enough has been said already.

The Government of India Act, 1935 cannot be said to be a pure and unalloyed federation after Lord Haldane's own heart. The very term " federation " implies agreement or a compact whereby a number of states put some of their powers into common custody,

---

5. (1935) A.C. 484.

and such agreement is lacking in the case of the 1935 Act because the Governor's provinces had no option but to join the federation. Residuary powers are neither in the Centre nor in the Provinces but are left to be allocated by the Governor-General to either of them at his discretion. The Act of 1935 is rigid and is unalterable by the Indian legislature except in the two cases provided for by Ss. 83 and 308.

Constitutions can also be divided into monarchical and republican constitutions. The latter is a state without a hereditary king.[6]

III. Reasons for Studying the Constitutional Law of the Dominions: We have to study the Constitutional Laws of the Dominions—at any rate of the British Empire federations—not because they might possibly satisfy an idle sense of curiosity but because their study is imperative for a sensible understanding of the Indian Act. As Lord Sankey, L.C. observed in *In re Regulation and Control of Aeronautics in Canada*.[7] "Many inquests have been held upon Ss. 91 and 92 of the British North America Act and many great lawyers have from time to time dissected them." The Privy Council as well as the Dominion Supreme and High Courts have prescribed remedies for the maladies from which the Constitutions suffered and these prescriptions have been in many cases incorporated into the Indian enactment, which is based on the experience of the working of the Dominion constitutions in the light of judicial interpretation. We shall take four illustrations from the Government of India Act, 1935 of the assimilation of the principles of judgemade law in respect of Dominion constitutions by the Act.

(*a*) *Power to implement Treaties with Foreign Countries:* Under S. 132 of the British North America Act 1867 the Dominion Parliament has power to enact legislation for the performing of the obligations of Canada as a part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries. Where the treaty is entered into by Canada as part of the British Empire, the section clearly applies and the Dominion Parliament by virtue of it can invade even the sphere of legislation of the provinces. But suppose, as it is now permissible, in view of the growth of the international status of Canada, it enters into a treaty with a foreign nation alone and not as a part of the British Empire. The section would not clearly apply to such a case. In such a case can the Dominion Parliament legislate in

---

6. There is a controversy going on as to whether India should be described as a "sovereign democratic republic" or "sovereign democratic state" in the preamble to the Draft Constitution of India. The view has been expressed by some persons that India cannot break away from the Empire, notwithstanding the wide powers conferred on it by the Indian Independence Act, 1947, (10 & 11 Geo. VI, C. 30) *qua* the other dominions unilaterally.

7. (1932) A.C. 54.

respect of provincial matters under the pretext of legislating for implementing a treaty with a foreign country? Or is the section to be strictly confined to its terms and not to be made applicable to such cases? That the latter is the correct view has been laid down by the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario*.[8] That case arose out of three statutes passed by the Dominion Parliament of Canada—the Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935 and the Limitation of Hours of Work Act, 1935—to give effect to an International Labour Convention under the Treaty of Versailles. This convention was signed on behalf of Canada alone. Clearly the legislation affected " property and civil rights " in the province which by S. 92 of the British North America Act is reserved to the provinces. The Privy Council had no difficulty in holding that the legislation was clearly *ultra vires* the powers of the Dominion Parliament. S. 106 of the Act of 1935 gives effect to this decision by enacting that in such cases the Federal Legislature has no power to legislate on provincial matters without obtaining the consent of the Governor of the province concerned.

(*b*) *Power of the Federal Legislature to Legislate in respect of Provincial Subjects:* In Canada it was at one time thought that where a matter had assumed such dimensions as to affect the body politic of Canada, that matter was taken out of the sphere of provincial legislation and thus brought within the purview of Dominion legislation even though it involved interference with subjects in the provincial legislative list. For example in *Russell* v. *Queen*[9] it was held that drink had become such a national evil and that therefore the Dominion could legislate enforcing prohibition even though property and civil rights were affected in the provinces, under the power given to the Dominion Parliament to legislate for the peace, order, and good government of Canada by S. 91. But this view has been rejected in *Attorney-General for Canada* v. *Attorney-General for Ontario*[10] where it was held that the only cases in which overriding of the normal distribution of powers in Ss. 91 and 92 is permissible are where there is some extraordinary peril to the national life of Canada, like war, or epidemic, or pestilence. S. 102 of the Act of 1935 is in harmony with this decision and enacts that where the Governor-General by Proclamation declares that a grave emergency exists whereby the security of India is threatened whether by war or internal disturbance, the Federal Legislature shall

---

8. (1937) A.C. 326. 9. (1882) 7 App. Cas. 829.

10. (1937) A. C. 326. See also *Toronto Electric Commissioners* v. *Snider* (1925) A.C. 396. In *Attorney-General of Canada* v. *Canada Temperance Federation* (1946) F.L.J. 50 the Privy Council has laid down that " the true test must be found in the subject-matter of the legislation ; if it is such that it goes beyond local or provincial concerns and must from its inherent nature be the concern of the dominion as a whole, then it must fall within the competence of the Dominion Parliament."

have power to make laws with respect to any of the matters in List II, the provincial list.[10a]

(c) *Prerogative to grant Special Leave to Appeal to the Privy Council :* The power of Dominion Parliaments to abolish the right of appeal to the Privy Council by way of special leave was considered by the Privy Council in two cases, *Nadan* v. *King*[11] and *British Coal Corporation* v. *King*.[12] In *Nadan's case* the Canadian Parliament legislated abolishing appeals to the Privy Council by special leave in Canadian criminal cases. The validity of this Act was attacked on two grounds, namely that the legislation was repugnant to the Judicial Committee Acts of 1833 and 1844 and that it was therefore invalid because the Colonial Laws Validity Act 1865 prohibited a Dominion from enacting legislation repugnant to Acts of the Imperial Parliament ; that the legislation purported to affect proceedings which took place outside the Dominion and was therefore invalid because it had an extra-territorial application. The first ground was clearly tenable but as to the second it might be said that the matter was doubtful because Courts were not unanimous then as to the extent to which a Dominion had extra-territorial powers of legislation, a matter which we shall consider in detail when we deal with the case of *Croft* v. *Dunphy*.[13] Both these objections were upheld by the Privy Council. In December 1931 was enacted the Statute of Westminster. We shall consider the provisions of that Statute later in detail, but it will suffice for the present purpose to say that it removed both the objections raised in *Nadan's case*.[14] By S. 2, the Dominions were given power to enact legislation repugnant to Imperial statutes. This section was not to be applicable to Australia, New Zealand, and New Foundland[14a] until adopted by them. But that did not affect the position as regards Canada. Again S. 3 says : 'It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having an extra-territorial operation.' So when the question came up again before the Privy Council in *British Coal Corporation* v. *King*[15] in 1935 it might be thought that the matter was concluded. But Mr. Wilfrid Greene (now Lord Greene, M.R.) who argued for the petitioners in the 1935 case apparently did not think so ; for he raised a new ground of objection to the Canadian enactment. No doubt even admitting that the prerogative to grant special leave to appeal was merged in the Judicial Committee Acts and that after the Statute of Westminster the Dominions could enact legislation repugnant to the former, he asserted another principle namely that a statute which affects the prerogative must refer

---

10a. By the India (Proclamations of Emergency) Act 1945 (9 & 10 Geo. VI, C. 23), S. 1 the federal legislature has power to legislate as regards residuary matters, when a Proclamation under S. 102 is in force.

11. (1926) A.C. 482. 12. (1935) A.C. 500. 13. (1933) A.C. 156.

14. (1926) A.C. 482. 14a. Newfoundland at a recent referendum has decided to join Canada. 15. (1935) A.C. 500.

to the prerogative in express terms, and power to affect the prerogative must be given to the legislature concerned expressly or by implication. About the first part of Mr. Greene's principle there was little difficulty for in the 1935 case the Canadian enactment 23 & 24 Geo. V, C. 53 contained the words 'notwithstanding any Royal Prerogative'. The second part was also easily disposed of by the Privy Council which held that when the Imperial Parliament gave to the Dominion legislature power to legislate with respect to criminal law (which is an item in the Dominion legislative list under S. 91 of the British North America Act) it must also be deemed by implication to have given it the power to legislate in a manner affecting the prerogative.

'The right to appeal by way of special leave is to be treated as simply one element in the general system of appeals in the Dominion and not as being a matter standing as it were on a pedestal by itself. The appeal, if special leave is granted, is from a decision of a Canadian Court and is to secure a reversal or alteration of an order of a Canadian Court, Rights in Canada and law in Canada will be thus affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of Canadian Courts.'[15a]

S. 110 (*b*) (iii) of the Act of 1935 expressly lays down that the Federal Legislature has no power to make any law derogating from any prerogative right of His Majesty to grant special leave to appeal from any Court; but this is subject to the provisions of the Act, and by S. 206 (2), the Federal Legislature can abolish direct appeals to the Privy Council from decisions of High Courts in civil cases when it gives to the Federal Court an enlarged appellate jurisdiction in civil cases in accordance with the provisions of S. 206 (1).[16]

(*d*) *The Doctrine of Immunity of Instrumentalities:* This doctrine which was propounded by Marshall, C.J. first in the case of *McCulloch* v. *State of Maryland*[17] shortly amounts to this. Within their respective spheres, the Federal and State Governments should be entitled to carry on their operations without any interference by the other; the Federal Constitution contains an implied provision that neither the Federal nor State Legislature can lawfully pass any enactment entailing any such interference. If the Federal or State Government attempt to retard, impede, burden, or in any manner control the operations of the other, whether by way of taxation or otherwise, such an attempt is unlawful. The practical effect of the doctrine which is based on an implied term in the constitution amounts to this: federal instrumentalities

---

15a. In the recent case of *Attorney-General of Ontario* v. *Attorney-General of Canada* (1947) F.L.J. 17 (P.C.) the Judicial Committee has upheld the validity of a Dominion law abolishing appeals to the Privy Council in civil as well as criminal cases and from both the Supreme Court and the Provincial High Courts.

16. By Act No. 1 of 1948 direct appeals in civil cases to the Privy Council have been abolished from 1-2-48.

17. (1819) 4 Wheat. 316.

are free from the operation of state laws which amount to an interference with the former and *vice versa*. As regards Canada this doctrine was rejected by the Privy Council in *Bank of Toronto* v. *Lambe*.[18] In that case it was held that the Quebec legislature could legislate for the taxing of a company incorporated by an Act of the Dominion Parliament (a federal instrumentality), the tax varying with the paid-up capital and the number of branches of the company. As regards Australia, it has become the fashion with text-book writers to say that this doctrine has been overruled by the decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.*,[19] (more popularly known as the *Engineer's case*); but this statement is not quite accurate for reasons which we shall examine later. What the *Engineer's case* held was that the immunity could not be claimed on the basis of implied prohibition in the constitution. This did not mean that immunity might not be claimed on other grounds. But even in Australia it was admitted that the doctrine should not be accepted without some qualifications. The first qualification was that it applied only to governmental or sovereign functions and not to private dealings like trade etc., in which Government might be engaged. The other qualification was that the doctrine did not apply to the exclusive powers of the Commonwealth which must prevail even as against state instrumentalities. Then came the *Engineer's case*.[20] The question there was whether the State of Western Australia which carried on trading operations and employed people, was subject to the Commonwealth Conciliation and Arbitration Act. Of course the trading operations were admittedly not governmental functions and therefore even according to the upholders of the doctrine there could be no immunity. But Isaacs, J. delivering the majority opinion of the Court (from which Gavan Duffy, C.J. dissented) enunciated certain general principles. The basis of future immunity was rested on conflict of law with law, the federal law in such cases prevailing by virtue of S. 109 of the Australian Constitution Act. Hence so far as states were concerned there could be no such immunity. And the Commonwealth law was to prevail even over state Acts within their exclusive competence according to Isaacs, J's interpretation of S. 109. The *Engineer's case*[20] was directly applied in *Pirrie* v. *McFarlane*[21] where it was held that a member of the Defence force was not exempt from state legislation relating to the speed limit of motorcars, there being no repugnancy between the Federal Defence Act and the State law. Even though rejected, the doctrine attempted to rear its head again, in a disguised form, in *Stuart-Robertson* v. *Lloyd*[22] where it was sought to exempt a bankrupt member of a State Parliament from a Commonwealth law authorising a Court of Bankruptcy to order him to pay

---

18. (1887) 12 App. Cas. 575.
19. (1920) 28 C.L.R. 129.
20. (1920) 28 C.L.R. 129.
21. (1925) 36 C.L.R. 170.
22. (1932) 47 C.L.R. 482.

a weekly sum out of his Parliamentary allowance to the trustee of his estate for the benefit of his creditors. The argument that such a law was in conflict with the State Constitution was rejected. In India, Ss. 154 and 155 of the Act of 1935 deal with the exemption of the Federation from state taxation and *vice versa*. So the doctrine of implied prohibition enunciated in *McCulloch* v. *Maryland*[23] does not find a place in the Indian Act and any immunity of state or federal instrumentalities must, as in Australia, be ascertained only with reference to the provisions of S. 107 which deals with repugnancy between federal and provincial laws.

IV. Dominion Status : This phrase is a convenient catchword which has been coined to indicate the vague, fluid, and ever growing constitutional relationship between the various autonomous parts of the Empire and the Mother Country and its indiscriminate and unthinking use has been the cause of much mischief. The term has certainly acquired a bad odour and is suggestive of proprietorship of land and feudalism, and Parliament in enacting the Indian Independence Act, 1947 (10 & 11 Geo. VI, C. 30) recently made strenuous efforts to substitute for it some more pleasing and innocuous term, but due to want of time was not successful in its efforts. A state in the British Commonwealth can be called a dominion if it possesses certain characteristics. It should have the power to negotiate treaties with foreign countries independently, there should be no limitations on its legislative powers, it should enjoy diplomatic representation in other countries, should have an effective control over its defence, and its international status should be recognised by other countries.[24] We shall examine how the dominions fought for, and in course of time obtained, the above privileges.

---

23. (1819) 4 Wheat. 316. As Viscount Simon, L.C. has observed in *King-Emperor* v. *Benoari Lal Sarma* (1945) F.L.J. 1 (P.C.) : " The question whether the Ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or policy. It depends simply on examining the language of the Government of India Act, 1935." In that case S. 10 of the Special Criminal Courts Ordinance II of 1942 authorised the Provincial Government by order in writing to transfer to Special Magistrates appointed under the Ordinance cases punishable under the Indian Penal Code. The Calcutta High Court held that this amounted to a delegation of legislative power by the legislature to the executive without any directions as to the manner in which the power was to be exercised and hence was invalid. The Federal Court confirmed the view of the Calcutta High Court on appeal, but the Privy Council overruled the Federal Court holding that nowhere in the 1935 Act was there any prohibition against the procedure adopted by the Ordinance and hence it was valid.

24. They i.e. the dominions, were defined by the Report of the Inter-Imperial Relations Committee appointed by the Imperial Conference of 1926 (known as the Balfour Committee) (Cmd. 2768) as "Autonomous communities within the British Empire equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." As to Dominion Status and the Statute of Westminster, 1931, see *The British Empire* a Report by a study

Power to make Treaties : In 1854 when the dominions had to enter into any treaty with a foreign Power the negotiations were conducted by the British representative and the treaty was signed only by him. But the dominion ministry was consulted in the matter. In 1884 the further stage was reached when the treaty was jointly negotiated and signed by a dominion representative as well as by a British representative. From 1907 the British representative did not join in the negotiations though he also signed the treaty and the final stage in the treaty-making power was reached in 1923 when Canada signed a fishery treaty with the United States which bore no British signature.

Removal of Restrictions on Legislative Powers : Before the Statute of Westminster 1931, the dominions laboured under some disabilities in regard to their law-making powers. They could not repeal or amend Acts of the British Parliament, the extent of their right to legislate extra-territorially was in doubt, and Acts of the British Parliament could be applied to them without their consent. All these disabilities have been removed by the Statute of Westminster.[25]

---

group of the Members of the Royal Institute of International Affairs (1937), *The Statute of Westminster* by K. C. Wheare (1938), *The Statute of Westminster*, R. P. Mahaffy (1932).

25. The Statute of Westminster is based on the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 (Cmd. 2768) and the Report of the Conference on the Operation of Dominion Legislation, 1929 (Cmd. 3479). By S. 2 power is given to the Dominion legislatures (including the provincial legislatures in Canada but not the provincial legislatures in other dominions) to make laws repugnant to existing or future Acts of the British Parliament. By S. 3 it is hereby declared that the Dominion legislatures have full powers to make laws having extra-territorial operation. S. 4 lays down that no Act of the British Parliament shall apply to a Dominion as part of the law of that dominion unless it is declared in the Act that the dominion has requested and consented to the enactment of the same. S. 2 does not authorise the alteration of the Constitution Acts of Canada (S. 7), Australia or New Zealand (S. 8). Ss. 2 to 6 do not apply to Australia, New Zealand and Newfoundland unless adopted by them (S. 10). The wisdom of enacting such a statute has been questioned. Mr. J. H. Morgan, K.C. in his address to the Royal Empire Society in November 1931 thought that the authors of the Balfour Report on which the Statute is based were writing English and not law. " The Statute cannot be properly understood unless it is seen to be an element only in a collection of rules, legal and non-legal through which the status of the Dominions is defined." K. C. Wheare, "*The Statute of Westminster and Dominion Status*" (1938), p. 301. "An attempt to fix by law those relations which should remain loose and easy to change is neither to be commended in theory nor certain of success in practice." R. P. Mahaffy "*The Statute of Westminster*" (1932), p. 4. Sir John Simon in his foreword to the second named book says " Whether the statute does not raise constitutional controversy as well as allay it, time alone will show." The Indian Independence Act, 1947 (10 & 11 Geo. VI, C. 30) goes further than the Statute of Westminster. By S. 6 (2) " *this* or any existing or future Act " of the British Parliament can be amended by the Parliaments of India and Pakistan. By S. 6 (4) Acts of the British Parliament do not apply to the two new dominions unless they are extended thereto by a law of the legislature of the dominion.

Diplomatic Representation : The dominions now enjoy diplomatic representation in foreign countries. For example Mussolini in 1937 sent an Ambassador to the Irish Free State and Mr. De Valera reciprocated by sending an Irish minister to the Court of the King of Italy.

Defence : In the last World War No. 1 the Canadian troops were under the control of the British Commander-in-Chief but now it has been recognised that the Canadian Commander-in-Chief will be responsible only to the Canadian Government for the safety of his command. The dominions possess unfettered control over their forces and even in the event of declaration of war by Britain which might involve them willingly or otherwise in hostilities, it would rest with them to decide to what extent, unless attacked, they would use their forces to aid Britain, and in every case their Parliament would have to decide, as is laid down for example in the Constitution of Eire, 1937, S. 28 (3).

International Status : The dominions enjoyed representation in their own right in the League of Nations and they are enjoying a similar privilege now in the U.N.O. The dominion delegates express their views freely without taking the cue from Britain. The dominions can accord or refuse recognition separately to a Government apart from Britain. When Britain declares war all the Dominions are also automatically at war. This is due to the principle of constitutional law that the Crown is indivisible. There is a King of the British Empire and not a King of Canada or of Australia. But for active participation in the war, the consent of the Dominion legislatures is necessary. Some politicians with radical views have toyed with the idea of Dominion neutrality in a British war but these views have been unambiguously rejected, at any rate, in Canada and Australia. Because the responsibility for the land defences of Simonstown the headquarters of the British Navy in S. Africa has been undertaken by the S. African Government, this rules out their neutrality in British wars. By a Treaty of 1938 Eire has been conceded the right to remain neutral in the event of Britain becoming involved in war.

We shall examine how far India enjoyed Dominion Status under the 1935 Act by applying the above tests. Sir Samuel Hoare, the Secretary of State for India, who was the author of the 1935 Act, claimed that the Act was Dominion Status in action. We shall consider how far he was justified in making this claim for his Act. It might straightway be conceded that India under the 1935 Act enjoyed treaty-making power, power of diplomatic representation and a certain measure of international status. But all these privileges were vitiated and diluted by the irresponsible character of the Central Government, totally under the 1919 Act provisions which governed the Centre till 1947, and partially under the federal part of the 1935 Act which was never brought into force. Indian

delegates at International Conferences played to the tune set by Britain though this was naturally hotly denied. Legislative freedom has been curtailed to a great extent by Ss. 108 and 110 of the 1935 Act. The 1935 Act itself cannot be touched by the Indian legislature except to a very minor extent (see Ss. 83, 206 and 308). Acts of the British Parliament cannot be amended without the Governor-General's previous sanction. Laws affecting the succession to the Throne or the prerogatives of His Majesty, cannot be passed by the Indian legislature. Thus the Indian legislature under the 1935 Act has been gagged, and bound hand and foot. The helplessness of India in the matter of defence, completely belies the claim of Sir Samuel Hoare that India enjoyed Dominion Status under the 1935 Act. We shall examine this matter historically and at some length. One or two striking features of Indian defence policy stare us in the face and compel notice. One is the dogma of the Indian Army that only certain races like Sikhs and Gurkhas are fit to enter the military profession. The other is the use of troops to quell internal disturbances. Up to 1918 Indians could get only the Viceroy's Commission and not the superior King's Commission, in the army. 10 vacancies were reserved for Indians in the Military College at Sandhurst in England. Indians though holding the King's Commission could not serve in tank, artillery or air divisions. In 1923 Lord Rawlinson the then Commander-in-Chief of India, proposed a scheme by which the Indian element in the Army was to be completely segregated from the British element. Under this scheme 5 infantry battalions, 2 cavalry regiments, and a pioneer unit, were in course of time to be manned completely by Indian officers. This planting of the caste system into the Indian Army was severely criticised by the Skeen, Committee which was appointed in 1925 to enquire into the Army question. The Committee was presided over by Sir Andrew Skeen, Chief of the Staff of the Army in India and included 10 Indians among its members. The Committee recommended the establishment of a Military College in India on the lines of the Sandhurst College. Defence is a reserved subject under the Government of India Act, 1935 and the Governor-General is advised on defence matters by a Counsellor who is not responsible to the legislature. The Joint Parliamentary Committee Report was of the view that Army policy and the Army budget should be considered by the Federal Ministry as a whole and not merely by the Defence Counsellor, and this view has been embodied in the Instrument of Instructions to the Governor-General, which enjoins him to foster a sense of joint responsibility among his ministers. Having regard to the above facts, one fails to see how India can be said to have enjoyed Dominion Status in any sense of that term, under the 1935 Act.

V. Interpreting the Constitution : Principles : (i) Words must be read in their grammatical and ordinary sense.[26] (ii) Recourse may be had to history and previous legislation in construing the Constitution, but only to clear up some ambiguity or other obscurity. (iii) Where an Act contains valid as well as invalid provisions, and the latter are severable from the former, effect should be given to the former notwithstanding and striking out the latter. For example in *Umayal Achi* v. *Lakshmi Achi*[27] the Federal Court held that the Hindu Women's Right to Property Act 18 of 1937 which dealt with the devolution of women's property generally, was valid so far as non-agricultural property was concerned even though its provisions in regard to agricultural property were invalid because the Central Legislature after 1st April 1937 had ceased to have power to legislate in respect of agricultural property. (iv) Where two constructions of an Act are possible one, rendering the Act valid, and the other rendering it invalid, the former construction should be made validating it. In *Macleod* v. *Attorney-General of New South Wales*,[28] a New South Wales law enacted that whosoever being married should marry again during the lifetime of the former wife or husband wheresoever such second marriage should take place, should be punished for bigamy. If the Act was confined in its operation to New South Wales it was valid and within the law-making powers of the New South Wales legislature But if it should be held to apply even to marriages taking place outside New South Wales, it would be invalid, and on the face of it the Act lent itself to both the above interpretations. The Privy Council applying the rule enunciated above gave the former interpretation and declared the Act valid. (v) A constitution Act being an organic or fundamental statute should be interpreted liberally and not technically or in a narrow spirit. The substantial character of the legislation, or as it has been put, its ' pith and substance ' should be looked into to decide whether it is valid or not, and not its outward form. For example, suppose a provincial legislature passes a law that no loan generally by a money-lender should carry more than 5 per cent interest. This legislation would also affect loans based on pronotes because they are not expressly excluded from the definition of loan. Now if the substantial character of the legislation is with respect to "money-lending" which is an item in the provincial legislative list, the law would be *intra vires* even so far as it relates to pronote

---

26. *Mutual Life Assurance Society* v. *Howe* (1922) 31 C.L.R. 290. In *Federated Gas Employers' Union* v. *Metropolitan Gas Co. and others*, 27 C.L.R. 72 it was decided that employees who were clerks although not manual labourers might be parties to an " industrial dispute " which is item 35 of the Commonwealth Legislative list (see S. 51 of the Commonwealth of Australia Constitution Act, 1900). In *Federated State School Teachers' Association* v. *State of Victoria and others*, 41 C.L.R. 569, Knox, C. J., Gavan Duffy and Starke, JJ. were of the view that teaching was not an industry. See Brennan "*Interpreting the Constitution*" (1935), pp. 86–96.

27. (1945) 1 M.L.J. 108 (F.C.).

28. (1891) A.C. 455.

transactions. But if its pith and substance is held to be "negotiable instruments" which is an item in the federal list the legislation would be *ultra vires*. The Privy Council in the recent case of *Prafulla Kumar Mukherjea* v. *Bank of Commerce Ltd., Khulna*[29] gave the former interpretation and upheld the validity of the Bengal Money-Lenders' Act 10 of 1940 on facts similar to those above stated, overruling the Federal Court decision in *Bank of Commerce Ltd., Khulna* v. *Kunj Behari Kar.*[30] (vi) An attempt should be made as far as possible to reconcile conflicting items in competing legislative lists.

---

29. A.I.R. (1947) P.C. 60 : In the above case Lord Porter propounded the true test as follows : " Its provisions (i.e. the provisions of a Provincial law) may advance so far into federal territory as to show that its true nature is not concerned with provincial matters but the question is not, has it trespassed more or less, but is the trespass whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking ? " *Prafulla Kumar's case* was concerned with the validity of the Bengal Money-Lenders' Act 1940 so far as it related to pronotes. The Bengal Act was similar in phraseology to the Madras Agriculturists' Debt Relief Act 4 of 1938, with this difference, that the former by S. 2 (12) (*e*) specifically included advances made on the basis of promissory notes within the definition of "loan," while the latter contained no definition of " loan ". In *Mada Nagaratnam* v. *Seshayya*, A.I.R. (1939) Mad. 361 (F.B.) a Full Bench of the Madras High Court upheld the validity of the Madras Act in so far as it related to pronotes. In *Subramanya Chettiar* v. *Muthuswami Gounden* (1940) F.C.R. 188 the question was not before the Federal Court because the case related to a simple contract debt (pronote debt merged in a decree) and there was no conflict with the provisions of the Negotiable Instruments Act. Nevertheless Sulaiman, J. let fall some *dicta* to the effect that the Madras Act was in pith and substance confined to matters in the provincial list, but because of the doctrine of occupied field (which lays down that where a Provincial law collides with a dominion law the latter prevails), the Madras law was invalid. S. 107 was not exhaustive of all types of repugnancy and the doctrine of repugnancy applies also to existing laws with respect of matters in the exclusive federal list. See chapter 10 *post.* In *Somayajulu* v. *Subbarayadu* (1945) F.L.J. 105 (H.C.) a Full Bench of the Madras High Court held that their previous Full Bench decision in *Mada Nagaratnam's case* must be deemed to have been impliedly overruled by the Privy Council decision in *Kunj Beharikar's case* since there was no difference between the Madras and Bengal Acts in principle except in the matter of defining a loan. The Madras Act fixed a maximum interest of 6% on loans of agriculturists and applied the rule of *Damdupat* to such loans. The Bengal Act made it obligatory on money-lenders to obtain licences, to maintain accounts and to furnish their customers with a copy of the same. The effect of the Federal Court decision in *Kunj Beharikar's case* was nullified by the enactment of Ordinance 11 of 1945 (5th May 1945) by the Governor-General which validated the provisions of the Madras Act IV of 1938 relating to pronotes declared invalid by the Federal Court. The importance of the Privy Council decision in *Prafulla Kumar Mukherjea's case* consists in the fact that therein the Board has restated the pith and substance rule in happier phraseology. *Kunj Beharikar's case* laid too much stress on incidental and substantial encroachment and gave one the impression that this was the sole test of determining the validity of the legislation. The Privy Council has corrected this impression and laid down that the degree of encroachment is relevant only for the purpose of finding out whether the legislation is substantially provincial.

30. (1944) F.C.R. 370.

For example in Canada 'marriage and divorce' is a dominion item while 'solemnisation of marriage' is a provincial item. Now, if the federal item is given a wide and liberal interpretation and no attempt is made at reconciling the conflicting legislative items, it would mean that the dominion item swallows up the provincial item, and, that provinces will have no power to legislate at all even in regard to solemnisation of marriage, on the principle that the greater includes the lesser. But the Privy Council in *In re Marriage Legislation in Canada*[31] has held that this was not the intention of Parliament and that this is not the correct method of interpretation and that the dominion item "marriage" should be given the meaning of "marriage excluding solemnisation". A similar problem arose in India in the interpretation of the 1935 Act. "Excise" is a federal item while "taxes on sales of goods" is a provincial item. No doubt in other countries the word "excise" has been given a very extended meaning and been held to include taxes on manufacture, taxes on first sales, and even taxes on retail sales. If this wide interpretation were given this would in effect render the provincial legislature's power to levy a tax on sale of goods nugatory, because the provincial list is subject to the provisions of the federal list. The Privy Council in *Governor-General in Council* v. *Province of Madras*[32] has held that a tax on first sales is not excise. (vii) The doctrine of repugnancy and the doctrine of *ultra vires* should not be mixed up and should be kept distinct. If a law is *ultra vires* there is an end of the matter, and it is clearly invalid. But if it is *intra vires* there are other questions to be considered before it can be pronounced to be valid. For example S. 107 of the 1935 Act lays down that when a Provincial Act is repugnant to a Federal Act the latter prevails. In such a case even though the Provincial Act is *intra vires* it becomes invalid because it collides with the superior legislation of the federal legislature which is given preponderance by S. 107. (viii) Because the 1935 Act is federal in character, a very wide meaning which might appropriately be given in a proper context to terms in a Constitution Act cannot be given to entries in the lists in the 7th Schedule to the Act. This is illustrated by the case of *Governor-General in Council* v. *Province of Madras* (1945) F. L. J. 69 (P.C.). In that case the validity of the Madras General Sales Tax Act, 1939, which imposed a tax on the turnover of dealers was questioned on the ground that the subject-matter of the legislation was "excise" which was an item in the federal list. The Privy Council held that the Act was covered by the entry "taxes on sale of goods and advertisements" in the provincial list. Excise is levied upon a manufacturer in respect of his goods, whilst sales tax is levied upon a vendor in respect of hissales. The two are distinct and sepa-

---

31. (1912) A.C. 880. 32. (1945) F.L.J. 69 (P.C.). See also (1944) F.L.J. 125.

rate imposts. The fact that excise is levied at the time the excisable article leaves the factory for the first time upon the occasion of its sale is an accident of administration. That this is so is demonstrated by the fact that in certain cases e.g., alcoholic liquor, opium, narcotic drugs etc., the provincial legislature has got power to impose excise duties. The Madras Act is not a duty of excise in the cloak of a tax on sales, and lacks the characteristic features of a duty of excise such as uniformity of incidence and discrimination in subject-matter. The Madras High Court (Leach, C.J. and Chandrasekhara Iyer, J.) held that sales tax on first sales was excise but this judgment was reversed by the Federal Court in *Madras Province* v. *Boddu Paidanna*, A.I.R. (1942) F.C. 33 and the Federal Court judgment was affirmed by the Privy Council. In *Central Provinces and Berar Sales of Motor Spirits and Lubricants Taxation Act* 1938 *In re* A. I. R. (1939) F.C. 2 Sulaiman, J. expressed *obiter* the view that a tax on first sales might amount to excise. (ix) The question whether an Act is valid or invalid does not depend upon considerations of jurisprudence or policy but on examining the language of the Constitution Act. See *Emperor* v. *Benoarilal Sarma* (1945) F.L.J. 1 (P.C.) *ante* p. 11.

VI. Indian Constitutional History: This falls naturally into 5 periods. (1) The East India Co., as traders (1600–1765), (2) The East India Co., as rulers (1765–1858), (3) India under the Crown (1858–1919), (4) Beginnings and Growth of Responsible Government (1919–1947), (5) India as a Dominion (1947–).

1*st Period* (1600–1765): After Vasco da Gama had discovered a direct sea route to India in 1498 the Portuguese and the Dutch established trade connections with India and the English also followed suit in 1600, when they applied to Queen Elizabeth for and obtained, a Charter to trade in all parts of Asia, Africa and America. The Charter was to last for a period of 15 years and by it the East India Co. was given the power to grant trading licences to others also and persons who traded without such licence could be punished and their belongings forfeited. The company could also make laws for its servants. In 1609 James I made this Charter perpetual. The Charter of 1661 gave the Governors power to deal with all cases within their jurisdiction. In pursuance of this power the Governor of Madras used to sit in Fort St. George every Wednesday and Saturday to dispose of cases. By the charter of 1687 the Madras Corporation consisting of a Mayor, 12 aldermen and 60 or more burgesses was established. At this time the question as to whether the Crown or Parliament had the power to grant the monopoly to trade with India was agitating the public mind and in *East India Co.* v. *Sandys*,[32a] Lord Chief Justice Jefferys gave a verdict in favour of the Company and restrained one Sandys who

---

32*a*. 10 St. Tr. 371.

attempted to trade unauthorisedly. But when the Company seized a ship called the *Redbridge* which was on its way to the Cape of Good Hope, Parliament intervened and held that all subjects of England have an equal right to trade with the East Indies unless prohibited by Parliament.[32b] This decision opened the way for fresh enterprises and a new Company was formed which competed with the old Company. Due to the efforts of Lord Godolphin the two companies were amalgamated. By the Charter Act of 1726 Mayor's Courts were established in Madras, Bombay and Calcutta consisting of a Mayor and 9 aldermen, 7 of whom were to be British subjects, to hear civil cases between British subjects. These Courts had no jurisdiction over Indians unless they submitted themselves to the jurisdiction of the Court. Appeals lay in small cases to the Governor and in big cases to the Privy Council. The Governor and his Council heard criminal cases once in every 3 months. There were also Courts of Requests corresponding to the modern Small Cause Courts to try petty cases. It was about this time that England defeated her rival France decisively and obtained an ascendancy in Indian affairs. This period was also remarkable for the growing corruption among the servants of the East India Co., who amassed great fortunes in India and paraded them before their unsympathetic and envious countrymen. The result was there was a demand for an enquiry into the affairs of the Company, and this led to the passing of several Parliamentary enactments which radically altered the administration which had been in vogue in India till then. We now come to the 2nd period.

2nd Period (1765–1858) : The beginning of the 2nd period was marked by an event of historic importance, namely the grant of the revenue administration of Bengal, Bihar and Orissa by the titular Moghul Emperor Shah Alum to the British. The British utilised this power indirectly to establish also Courts of justice, *Dewani Adalats* in the mufassal and *Sadr Dewani Adalats* in the capital, which were in theory those of the Moghul Emperor but which in fact were manned and controlled by the British. In 1773 was passed the famous Regulating Act by which a Governor-General and 4 councillors were appointed to administer the Presidency of Fort William in Bengal. Bengal became the premier presidency and the Governor-General in Council was given the power of superintendence over the presidencies of Madras and Bombay. The subordinate presidencies could not make peace or declare war without the consent of the Governor-General except in urgent cases. A Supreme Court was also established consisting of a Chief Justice and 3 Judges. The powers of the Supreme Court were not defined clearly and this led to clashes between the Governor-General and the Court. To obviate this difficulty by an Amending Act of 1781 the Governor-General and members of his Council were placed beyond

---

32*b*. Resolution of House of Commons dated 11th January 1694.

the jurisdiction of the Supreme Court in respect of acts done in their official capacity. Unlike the Mayor's Courts the Supreme Court had jurisdiction over all inhabitants of Calcutta and not merely over British subjects. But in cases of inheritance, succession, and contract, where the parties were Indian, they were to be governed by their personal laws. Cowell in his Tagore Law Lectures on '*Courts and Legislative Authorities in India*' is unduly hard on the Regulating Act when he says that 'it really regulated nothing but clogged the wheels of Government and threw the affairs of the Company into confusion.' By the Act of 1784 a Board of 6 Commissioners called the Board of Control was established to control the affairs of the Company. This Act marks the assumption of Parliamentary control over Indian affairs. In cases where secrecy was required the Board could act through the channel of a secret committee of the Court of Directors. The number of members of the Governor-General's Council was reduced to 3 and the Commander-in-Chief was made a member. By the Charter Act of 1833 the Governor-General of Bengal became the Governor-General of India and the number of members of the Governor-General's Council was increased to 4 by the addition of a Law Member who could sit and vote only when the Council met for legislative purposes. A Law Commission to codify, overhaul, and revise Indian laws was appointed and the legislative powers of the presidency Governors were taken away, and they could thereafter only send drafts of proposed legislation to the Governor-General who became the supreme legislative authority for the whole of India. By the Act of 1853 the Law Member was made an ordinary member. The strength of the Governor-General's Council when it met for legislative purposes was increased by the addition of 6 official members, 2 judges and 4 civilians. The proceedings of the Council were made public.

The Charter Act of 1853 is remarkable in that we have under it a legislative body distinct from the Governor-General's Council which combined both executive and legislative functions before. No doubt the legislature under the Act of 1853 was completely official in composition and contained no non-official element, but still we have in the Act of 1853 the germs of the modern Indian Legislatures.

3rd Period (1858–1919) : After the Rebellion of 1857 the Crown assumed direct control over India and a new office namely that of the Secretary of State for India was created through whom the Crown exercised its powers in relation to the governance of India. The Secretary of State was assisted by a council of 15 members 8 of whom were nominated by the Crown and 7 of whom were to be elected by the Court of Directors. The Council was merely an advisory body except in regard to some important matters in regard to which the Secretary of State was bound to follow the advice of the majority of his Council. The Indian Councils Act of 1861 marks another epoch in India's constitutional evolution. Under it the lawmaking powers of the presidencies which were taken away

by the Act of 1833 were restored, but with this proviso, that the Governor-General could disallow provincial Acts, and in certain cases insist on his previous sanction in the case of provincial bills. The Governor-General's Legislative Council was enlarged by making it consist of 12 members. All these members were to be nominees of the Governor-General and 6 of them were to be non-officials. But some more time was to pass before India had legislators who were elected instead of being nominated. The Indian Councils Act of 1892 went a step further in the matter of liberalising the composition and powers of the Central and Provincial legislatures. The strength of the Governor-General's Legislative Council was increased to 16 (including 10 non-officials) and that of Governor's Legislative Councils to 20. The principle of indirect election was also conceded. The Legislative Councils of Madras, Bombay, Bengal and United Provinces and the Bengal Chamber of Commerce elected 5 members to the Governor-General's Legislative Council and these were nominated to that body by the Governor-General. In the provinces members of the legislature were nominated by the Governor on the recommendation of District Boards, Universities, landholders and merchants. The budget could be discussed but was not votable and the right of interpellation was recognised. But still the principle of election was scrupulously avoided. By the Minto-Morley Reforms of 1909 the strength of the Central Legislature was increased to 60 and that of most provincial legislatures to 50, and statutory recognition was given for the first time to the principle of election. The budget was votable but the Government were free to accept or reject the recommendation of the Legislature. The right to ask supplementary questions was also conceded.

On 20th August 1917, Mr. Montagu, the Secretary of State for India, made an important declaration of policy which ushered in a new era of political reforms. The goal of British policy in India was declared to be the " gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India, as an integral part of the British Empire," and the " increasing association of Indians in every branch of the administration." This declaration of policy was the forerunner of the Montagu-Chelmsford Reforms of 1919 under which partial responsibility was granted in the provinces though the Centre continued to be as irresponsible as before. Certain subjects in the provinces like education, public health, forests, etc., were completely transferred to ministers responsible to the legislature, while other departments were in charge of Executive Councillors who were not responsible to the legislature. There was thus a dual system of provincial Government which has been dubbed as Dyarchy. The Centre under the 1919 scheme was irresponsible and this state of affairs was continued even after the passing of the Government of India Act, 1935, by the 9th Schedule to that Act which reproduced

the provisions of the 1919 Act dealing with the Centre. But in September 1946 when the Interim Government was formed, we managed to get autonomy at the Centre in fact, though not in law, within the framework of the 9th Schedule. After the 15th August 1947 when the Indian Independence Act 1947 came into force, the 9th Schedule was repealed, and we now have central autonomy in fact as well as in law within the framework of the 1935 Act which has been suitably modified so as to bring it into line with the far-reaching changes introduced by the 1947 Act.

4*th Period* (1919–47) : The Simon Commission was appointed in 1927 as laid down in the 1919 Act to enquire into the fitness of Indians to shoulder greater political responsibilities and withstand a larger dose of reform. It was unanimously boycotted by all Indian political parties worth mentioning and its reactionary report was shelved. In its place the Round Table Conference method was adopted and there were 3 Round Table Conferences in London between 1930 and 1932, where representatives from both British and Indian India met to hammer out a feasible solution of the Indian problem. A Joint Select Committee of both Houses of Parliament was established with Lord Linlithgow a former Viceroy of India as Chairman to go into the matter and it issued its epochmaking Report in 1934. On the basis of this Report which contains a mine of information on the Indian constitutional question the Government of India Bill was introduced into Parliament and became law on 2nd August 1935.[33] The provincial part of the Act (part 3) came into force on 1st April 1937 but the central part (part 2)

---

33. The 1935 Act was amended by the following Acts :—

(i) The Government of India (Amendment) Act 1939 (2 & 3 Geo. VI, C. 66) added a new S. 126-A which gave the federation power to issue directions to a province as to how its executive authority should be exercised when a proclamation of emergency under S. 102 was in force. (ii) The India and Burma (Miscellaneous Amendments) Act, 1940 (3 & 4 Geo. VI, C. 5) added Ss. 142-A, 154-A, 284-A, 305-A, amended Ss. 88 and 89, added a new proviso to S. 219 (1) and made a number of amendments to other sections. In S.311 (2) a new definition of "Corporation tax" has been inserted as meaning any tax on income payable by companies which is not paid on agricultural income, which is not authorised to be deducted from the dividends, and which is not taken into account in computing the income of the person receiving dividends for purposes of incometax. In S. 138 (1) the method of calculating incometax attributable to Chief Commissioner's provinces has been explained. In S. 138 (2) the words " or if it so prescribed the whole of those moneys " have been inserted after the words " such sum as may be prescribed ". A new S. 142-A has been added which removes all doubts which previously existed as to whether a provincial legislature could levy profession tax. Now it can be levied up to a maximum of Rs. 50 for one person for a year. For paragraph 46 of the provincial list " profession tax subject to the provisions of S. 142-A " has been substituted. In para. 2 of the federal list after the words " local self-government in cantonment areas (not being cantonment areas of Indian State troops) " the following words have been inserted " constitution and powers within such areas of cantonment authorities." The following new entries have been added to the Provincial

never came into force due to causes beyond the control of the British Government. On 3rd September 1939 World War II broke out and Congress Ministries which had been functioning in 7 provinces were withdrawn on 30-10-39 and were replaced by advisers who were all officials and were not responsible to the legislature. In August 1940 the Viceroy made his famous August Offer by which he offered to expand his Executive Council but the Congress rejected this offer

---

list : 48-A—Taxes on vehicles suitable for use on roads including tramcars; 48-B Taxes on the consumption or sale of electricity, subject to S. 154-A. The new S. 154-A prohibits a provincial or state legislature from imposing a tax on electricity sold to or consumed by the federal government or consumed by the Federal Railway Authority in the construction, operation, or maintenance of a federal railway. For the proviso to S. 88 (1) a new proviso has been substituted which makes it obligatory on the Governor to exercise his individual judgment as respects the promulgation of an ordinance under the section if a bill containing the same provisions would have required his or the Governor-General's previous sanction to introduction thereof in the legislature, or it would have been necessary to reserve an Act containing the same provisions for the consideration of the Governor-General or of His Majesty. A new proviso to S. 88 (3) makes it clear that for the purposes of S. 107 an ordinance under the section shall be deemed to be a provincial law which has been reserved for the consideration of the Governor-General and assented to by him. In the proviso to Ss. 89 (4) and 90 (3) after the words " repugnant—federal legislature " the words " or an existing Indian law with respect to a matter in the concurrent list" have been added. S. 202 (1) has been amended so as to permit the appointment of temporary judges of the federal court when a judge is appointed to act as Chief Justice or is for some other reason unable to perform the duties of his office. For entry 17 of the provincial list the following has been substituted. " Universities including universities other than those specified in para. 13 of list 1." The federal legislature by virtue of para. 33 of list 1 and the provincial legislature by virtue of para. 33 of list 3 have no power to make laws with respect to universities. A new definition of a " State " has been substituted in S. 311 (1) as meaning any territory outside British India which His Majesty recognises as a State by whatever name it is called. In S. 262 (1) for the words " any subject—state " the following has been substituted : " the subjects or any named subject of a specified state ". A similar change has been made in S. 262 (2). Sub-S. (4) makes it clear now that a person who on 31-3-40 is in the permanent service of the Crown in India shall not be ineligible to hold office by reason that he is not a British subject. In S. 273 (2) for " 31-3-36," "31-3-37 " has been substituted. For " Governor-General " " Secretary of State for India in Council " has been substituted, and for " 3 years " " 2 years " has been substituted. In the Government of India Family Pension Funds Order 1936 paras. 10, 16, 22, 25 for " 1936 " " 1937 " has been substituted. The new S. 284-A confirms the appointment of India Office staff and the staff of the Auditor of Indian Home Accounts. The new S. 305-A makes provisions as to the pensions of home civil servants appointed to offices in India. (iii) The India and Burma (Emergency Provisions) Act, 1940 (3 & 4 Geo. VI, C. 33) gave power to the Governor-General to make orders in Council during the war emergency, suspended the operation of the restriction that the Governor-General's Ordinance should last only for 6 months (S. 72, 9th Schedule) and removed the impediment in the way of conscripting British subjects. (iv) The India and Burma (Postponement of Elections) Act, 1941 (4 & 5 Geo. VI, C. 44) continued the life of the existing provincial legislatures for 12 months after the end of the war emergency. (v) The India (Federal Court Judges) Act, 1942 (5 & 6 Geo. VI, C.7) dealt with the situation where a Federal Court Judge has a personal interest in some

since what it wanted was a change in the powers and not merely the numbers of the Viceroy's Council. In March 1942 the British Government made the famous Cripps Offer by which India was to become a Union. The long term arrangement contemplated by the Cripps scheme was satisfactory but the interim arrangement proposed by it, especially in regard to defence, was not acceptable to the major Indian political parties and hence the scheme fell

---

particular case. (vi) The India and Burma (Temporary and Miscellaneous) Provisions Act, 1942 (5 &6 Geo.VI, C. 39) continued proclamations under S. 93 till the expiry of 12 months after the end of the war emergency. (vii) The India (Miscellaneous Provisions) Act, 1944, (7 & 8 Geo. VI, C. 38) has reduced the minimum number of advisers to the Secretary of State for India from 8 to 5, provides for the vacation of the office of a Judge of the High Court on his being appointed to the Federal Court or to another High Court, and deals with the non-filling up of vacancies in provincial legislative councils when a Proclamation under S. 93 is in force. (viii) The Attachment of States Act, 1944 (7 & 8 Geo. VI, C. 14) has transferred the jurisdiction exercised by the Crown in some small states to the larger states. This Act was the consequence of the decision of the Western India States Agency Court in *Bhadwa Taluka* v. *Crown* (1944) F.L.J. 2 holding such attachment to the illegal because it offended S. 2 (1) of the 1935 Act. (ix) The India (Proclamation of Emergency) Act, 1945, (9 & 10 Geo.VI,C. 23) gave the CentralLegislature, when a Proclamation of Emergency under S. 102 was in force, power to legislate whether or not for a province and with respect to any matter not enumerated in any of the lists in the 7th Schedule to the 1935 Act (S.1.). Where before 14th February, 1946, a High Court in British India had given a judgment involving a question as to the validity of any law, ordinance, rule, etc., passed in India in a civil case,any party might apply to the Federal Court if an appeal had been decided by the Federal Court in such case, or to the High Court in any other case, within 90 days for a review of the case in the light of the provisions of the Act. The Act was given retrospective operation from 1-4-1937 except S.2. (x) The India (Central Government and Legislature) Act,1946, (9 &10 Geo. VI, C. 39) has repealed S. 36 of the Government of India Act (9th Schedule) which lays down the qualifications of the members of the Governor-General's Executive Council. For one year after the Proclamation of Emergency under S. 102 ceases to operate, (or two years if the Governor-General so directs), the Indian Legislature shall have power to make laws with respect to trade and commerce, in and the production supply, and distribution of cotton, woollen textiles, paper, foodstuffs, petroleum, spare parts of mechanically propelled vehicles, coal, iron, steel, and mica, and with respect to unemployment among persons who have been serving during World War II in the armed forces of His Majesty. Such laws cannot be moved in the Legislature without the Governor-General's previous sanction. S. 107 (2) and S. 126 (2) shall apply in relation to a law enacted under this section, with respect to any matter as if that matter were a matter in Part II of the Concurrent List. The Indian Legislature is empowered to make laws continuing the requisitioning of land under the Defence of India Rules, 1939. The India Provisional Constitution Order 1947 has made the following amendments to the India (Central Government and Legislature) Act 1946 : S. 1 has been omitted and in S. 2 for "Indian Legislature" "Dominion Legis'ature" has been substituted, and in S. 2 (2) for "Governor-General in Council" "dominion" has been substituted. In S. 2 (3) "either Chamber of" has been omitted and in S. 2 (4) "Dominion" has been substituted for "federal." In S. 3 (1) for "Indian Legislature" "Dominion Legislature" has been substituted and for "Governor-General in Council" "Central Government" has been substituted. In S. 3 (2) for "Governor-General in Council" "Dominion" has been substituted. In S. 4 "the dominion legislature" has been substituted for "Both Houses of Parlia-

through.[34] In 1945 and 1946 at two Simla Conferences an effort was made to bridge Congress–Muslim League differences on the basis of parity of representation to these 2 parties in the Central Cabinet but the efforts failed because the Muslim League would not concede the right of the Congress to nominate a Muslim as one among its quota of ministers.[35] In September 1946 an interim National Government was formed at the Centre and the Muslim League stayed out of this Government at first but walked into it later. In May 1946 were made the famous Cabinet Mission Proposals which were the outcome of the tour of Lord Pethick-Lawrence, Secretary of State for India, Mr. A. V. Alexander and Sir Stafford Cripps. The statement of 1946 May was strongly against Pakistan or division of the country. It envisaged a Constituent Assembly entrusted with the task of drafting the future constitution of India.[36]

---

ment.'' A new S. 4–A provides that the powers of the dominion legislature under this Act shall be exercised by the Constituent Assembly until other provision is made by the Constituent Assembly under S. 8 (1) of the Indian Independence Act 1947. S. 6 (1) has been omitted. All these Acts are noted in the relevant contexts.

34. The important features of the Cripps Proposals (11-3-42) were:— (i) A new Indian Union was to be created, any province in India being given liberty not to accede to the Union if it so chose. (ii) A constitutionmaking body was to be set up on the cessation of hostilities with which Indian States were to be associated, whose members were to be elected by the lower houses of the Provincial Legislatures. (iii) Until the new constitution was framed His Majesty's Government were to bear the responsibility for the defence of India as part of their world war effort, but the task of organising the military, moral, and material resources of India was to be the responsibility of the Government of India with the co-operation of the peoples of India.

35. The main feature of the Wavell Plan to ease the then political situation outlined by H. E. The Viceroy, Lord Wavell, in the course of a broadcast talk on 14-6-45 was parity of representation for caste Hindus and Muslims in the Viceroy's Executive Council. The Governor-General while exercising his constitutional power of control over his Council would not exercise it unreasonably. This plan was discussed at theSimla Conference of 1945 but did not bear fruit because the Muslim League alleged that it was denied the right to nominate all the Muslim representatives. The Simla Conference of 1946 also shared a similar fate because in the originalWavell Plan the communal proportion of various representatives on the Viceroy's Council was fixed at 5 Hindus, 5 Muslims, 1 Sikh, 1 Indian Christian or Anglo-Indian and Mr. Jinnah alleged that the Viceroy had gone back on his word and substituted a new ratio of 5 : 5 : 3 for the ratio of 5 : 5 : 2.

36. The Statement of the Cabinet Delegation of 16th May 1946 gave weighty reasons against the proposal to divide India into two sovereign states " There are weighty administrative and economic considerations. To disintegrate the whole of the transportation and postal and telegraph systems—of India —would gravely injure both parts of India. To break the Indian armed forces into two would inflict a deadly blow on the long traditions and high degree of efficiency of the Indian Army. Any division of the Punjab would leave substantial bodies of Sikhs on both sides of the boundary.'' According to the Cabinet Mission Plan there was to be a Union of India embracing both British India and the Indian States dealing with foreign affairs, defence, and communications. Any question raising a major communal issue should be decided in the legislature by a majority of representatives present and voting of each of the two major communities, as well as by a majority of all the mem-

It was accepted by the Congress but the League was of the view that the Congress acceptance was qualified and hence the League rejected it and it receded to the background and is now of merely historical interest. Since the gulf between the Congress and the League was unbridgeable the only course left open, namely that of partition, was taken by the statement of the British Government made on 3rd June 1947[37]. On 18th July 1947 the Indian Indepen-

---

bers, present and voting. Residuary powers vest in the Provinces. Provinces should be free to form groups with executives and legislatures, and each group can determine the provincial subjects to be taken in common. Section A comprised Madras, Bombay, United Provinces, Bihar, Central Provinces and Orissa. Section B comprised Punjab, North-West Frontier Province, and Sind and Section C consisted of Bengal and Assam. The representatives to the constitution-making body were to be elected by the members of the Provincial Legislative Assemblies in 3 parts, General, Muslim and Sikh, each part electing its own representatives, and each province was to be allotted a total number of seats proportional to its population, roughly in the ratio of one to a million. The total number of representatives from British India was to be 292 (Group A 187, B 35, and C 70) and from States 93 making a grand total of 385. To Section A were to be added 3 representatives from Delhi, Ajmer-Merwara and Coorg. To Section B a representative from British Baluchistan was to be added. After the preliminary meeting the provinces were to divide into groups and each group would decide whether there should be any group constitution, and if so, with what subjects it should deal. In the Union Constituent Assembly resolutions varying the above provisions or raising a major communal issue required a majority of the representatives, present and voting, of each of the two major communities, the Chairman having power to decide what were major communal issues. After the first general elections under the new constitution, any legislature of a province could elect to come out of the group in which it had been placed, para. 19 (viii). There was also to be an Advisory Committee on rights of citizens minorities and tribal and excluded areas. The Congress interpretation of para 19 (viii) was that provinces in Groups B and C could opt out from the very beginning and need not wait until the group constitution and provincial constitutions had been framed and elections had been held under the provincial constitution. The Muslim League placed quite the opposite interpretation on para. 19 (viii), and rejected the long term proposals of the Cabinet Mission Plan but nevertheless participated in the Interim Cabinet.

37. **Statement of His Majesty's Government of 3rd June 1947** :—

In the case of those parts of the country which were unwilling to accept the constitution framed by the Constituent Assembly formed under the Cabinet Mission Plan, the wishes of the people of such areas were to be ascertained on the issue whether their constitution was to be framed by the existing Constituent Assembly, or by a new and separate Constituent Assembly consisting of the representatives of those areas which decided not to participate in the existing Constituent Assembly [para. 4 (*b*)]. The Bengal Legislative Assembly was to meet in two parts, one representing the Muslim majority districts on the basis of the 1941 census and the other the rest of the province. If a simple majority of either part decided on partition of the province, partition was to take place. A decision was also to be taken on the issue as to which Constituent Assembly the province as a whole would join in the event of the two parts subsequently deciding to remain united. In the event of partition being decided upon each part of the Legislature would decide which of the alternatives in para. 4 (*b*) to adopt. The Sind Legislative Assembly was to decide on the alternatives in para. 4. If the whole or part of the Punjab decided not to join the existing Constituent Assembly a

dence Act was passed by which two new Dominions, India and Pakistan, were created and this Act came into force from the appointed day, namely 15th August 1947.

---

referendum would be made to the electors of the Legislative Assembly in North West Frontier Province to choose the alternatives in para. 4. British Baluchistan was also to be given an opportunity to choose the alternatives in para. 4. If Bengal was partitioned a referendum was to be held in Sylhet whether it should continue to form part of Assam or amalgamate with the new province of East Bengal. Fresh representatives to the Constituent Assembly after partition, for Bengal, Punjab and Sylhet were fixed as follows : Sylhet 3, W. Bengal 19, East Bengal 41, W. Punjab 17, E. Punjab 12.

Subsequent History.

The 3rd June Plan of 1947 was implemented and as a result of the referendums held under it, the territories of Pakistan were to consist of W. Punjab, E. Bengal (with Sylhet district of Assam added) Sind, North-West Frontier Province and British Baluchistan. Fresh elections were held to elect representatives from these areas to the Pakistan Constituent Assembly. On 18th July 1947 the British Parliament passed the Indian Independence Act, 1947 (10 & 11 Geo. VI, C. 30) by which two new dominions, India and Pakistan were created as from the appointed day, i.e. 15th August 1947. The 1935 Act was to continue to apply till a new constitution drafted by the Constituent Assembly was brought into force, with such modifications as the Governor-General might by order direct (S. 9 of the Independence Act). The Governor-General issued a number of orders in exercise of this power amending the various sections of the 1935 Act, of which the following might be mentioned as being the more important among them :—(i) India Provisional Constitution Order, 1947, (14-8-1947). (ii) India Provisional Constitution (Amendment) Order, 1947, (26-8-1947). (iii) India Provisional Constitution and Provincial Legislature (Amendment) Order, 1947, (7-9-1947). (iv) India Provisional Constitution (Second Amendment) Order, 1947, (6-10-1947). (v) India Provisional Constitution (Amendment) Order, 1948, (5-2-1948). (vi) India Provisional Constitution (Second Amendment) Order, 1948, (10-2-1948). (vii) India Provisional Constitution (3rd Amendment) Order, 1948, (31-3-1948). (viii) Government of India (Distribution of Revenues) Order, 1948, (17-3-1948).

The following is a list of the other Orders made by the Governor-General :—

	Title.	Date of Gazette of India Extraordinary.	Subject.
1.	High Court Judges (Third Amendment) Order 1948.	24— 6—48	Amending 1st schedule of High Court Judges Order.
2.	Madras Partially Excluded Areas (Cesser) Order 1948.	1— 7—48	22 villages in Polavaram firka West Godavari and in other firkas of same district made ordinary areas.
3.	Bombay (Enlargement of Area and Operation of Boundaries) Order 1948.	4— 6—48	Merging some Indian states with Bombay presidency.
4.	Federal Court (Amendment) Order 1948.	17— 4—48	

5*th Period :* The political events which have happened since that date (15-8-47) are too recent to be viewed in their correct and proper perspective.

VII. Government of India Act, 1935 : Introductory Note : The authors of the 1935 Act expected that Part III of the Act

	Title.	Date of Gazette of India Extraordinary.	Subject.
5.	High Court Judges (Amendment) Order 1948.	17— 4—48	
6.	India Provincial Legislatures (Amendment) Order 1948.	31— 3—48	
7.	Indian Independence (Adaptation of Bengal & Punjab Acts) Order 1948.	31— 3—48	
8.	Indian Independence (Liabilities) Order 1948.	31— 3—48	
9.	Pakistan Monetary System and Reserve Bank (Amendment) Order 1948.	23— 3—48	
10.	Madras (Enlargement of Area and Alteration of Boundaries) Order 1948.	23— 3—48	Attaching *loge* at Masulipatam to Madras Province.
11.	Indian Independence (Adaptation of Central Acts and Ordinances) Order 1948.	23— 3—48	
12.	Orissa (Enlargement of Area and Alteration of Boundaries) Order 1948.	23— 3—48	
13.	Madras High Court (Extension of Jurisdiction to Coorg) Order 1948.	28— 2—48	Made under S. 230 (1) of the Govt. of India Act 1935.
14.	Indian Railways Act (Adaptation) Order 1948.	11— 2—48	Under S. 9 of the Indian Independence Act 1947.
15.	Indian Independence (Special Tribunals) Order 1947.	19—12—47	Varying the Indian Independence (Legal Proceedings) Order 1947.
16.	India (Adaptation of Income-tax, Profits Tax & Revenue Recovery Acts) Order 1947.	10—12—47	Made under S. 9 of the Indian Independence Act 1947.
17.	Indian Independence (Miscellaneous Transitional Provisions) (No. 2) Order 1947.	18—10—47	Providing for endorsement during transitional period (15-8-47 to 31-3-48) by Indian provincial Govts. of certificate or licence granted by provincial Govt. of Pakistan under chapter 2 or 3 of the Inland Steam Vessels Act 1917.

dealing with provinces would be brought into force at once and that Part II dealing with the Centre would be brought into force sometime later the Centre being governed in the interval, by the corresponding provisions relating to the Centre in the 1919 Act (which were reproduced in the 9th Schedule). But this expectation was not fulfilled. Part III came into operation on 1-4-1937, but due to World War II and other causes, Part II was never brought into force. The 9th Schedule instead of being a temporary expedient became a permanent feature of the constitution and there was no responsibility at the Centre till September 1946 when the Nehru National Government was installed. Even after September 1946 the responsi-

Title.	Date of Gazette of India Extraordinary.	Subject.
18. Notification.	15— 8—47	Made under Article 5 of the India Provisional Constitution Order 1947 and S. 166 (2) and (3) of the Govt. of India Act 1935 amending the Govt. of India (Audit & Accounts) Order 1936.
19. Government of India (Audit and Accounts) Amendment Order 1948.	1— 6—48	Made under S. 166 (2) of the Govt. of India Act 1935.

The following is a list of the orders made by the Governor-General under the Indian Independence Act 1947 : The Executive Council (Transitional Provisions) Order 1947 : The Indian Independence (Miscellaneous Transitional Provisions) Order 1947 : The India (Provisional Constitution) Order 1947: The India (Provincial Legislature) Order 1947 : The India (Adaptation of Existing Laws) Order 1947 : The Indian Independence (International Agreements) Order 1947 : The Indian Independence (Rights Property and Liabilities) Order 1947 : The Pakistan (Provincial Legislature) Order 1947 : Pakistan (Adaptation of Existing Pakistan Laws) Order 1947 : The Pakistan (Monetary System and Reserve Bank) Order 1947: The Pakistan (Provisional Constitution) Order 1947; The Indian Naval Forces (Temporary Governance) Order 1947 : The Federal Court Order 1947 : The High Courts (Bengal) Order 1947: The High Courts (Punjab) Order 1947: The High Court (Calcutta) Order 1947 : The High Court (Lahore) Order 1947 : Indian Independence (Partition Councils) Order 1947: The Arbitral Tribunal Order 1947 : The Crown Representative (Transfer of Property and Liabilities) Order 1947 : The Indian Independence (Legal Proceedings) Order 1947 : The Indian Independence (Incometax Proceedings) Order 1947 : The Joint Defence Council Order 1947: The India Provisional Constitution and Provincial Legislatures (Amendment) Order 1947 : Himachalapradesh Administration Order : Himachalapradesh (Courts) Order (Gazette of India 21-8-48) : Himachalapradesh (Refugees Registration) Order (Gazette of India 28-8-48) : Note : Some of the above have already been noticed in the previous two pages. The Governor-General's power to make orders under the Independence Act, 1947, ceased on 31-3-1948. After that date any amendment of the 1935 Act will have to be made by the Constituent Assembly which is a sovereign body. (The latest Government edition of the 1935 Act is corrected up to 6-10-1947).

bility of the Central Cabinet to the legislature was established by convention and not by amending the 1935 Act whose 9th Schedule still continued to exist in theory though many of its provisions had in practice fallen into disuse.

After 15th August 1947 we are having responsible Government at the Centre under the federal part of the 1935 Act which has been suitably modified. The 9th Schedule has been repealed from that date. Hence our description of the Central Executive and Legislature should comprise a threefold classification, under the 9th Schedule, under the 1935 Act as unamended, under the 1935 Act as amended after 15th August 1947.

VIII. Centre under the 9th Schedule : The Governor-General was assisted by an irresponsible Executive Council on which there were to be at least 3 officials and one lawyer[37a]. The Governor-General was bound by the decision of the majority of his Council. But in cases where the safety, tranquillity, or interests of British India were affected he could override them. Two members of the dissentient majority might require their dissent to be reported to the Secretary of State for India. The Governor-General could restore cut items in the budget. If one chamber refused to pass a bill it could be sent to the other chamber and if it passed it, it became law on the assent of the Governor-General and if it refused to pass it, it became law on the signature of the Governor-General. If a bill passed by one chamber was not within 6 months passed by the other chamber, the Governor-General could call a joint sitting of both chambers to consider the bill. The Governor-General could also stop further proceedings in respect of bills which affected the safety or tranquillity of British India. Truly it has been remarked that the Governor-General under the 1919 Act as also under the 9th Schedule was the Great Moghul of Delhi because of the dictatorial powers which he wielded.

IX. Centre after the 15th August 1947 : This topic also need not detain us much because by the amendments made to the Act after 15th August 1947, the Governor-General has been stripped of all the dictatorial powers which he possessed under the 9th Schedule and under Part 2 of the original 1935 Act, and now he merely functions as a constitutional head acting always on the advice of his ministers.

37a. See the India (Central Government & Legislature) Act, 1946 (9 & 10 Geo. VI, C. 3 9), S. 1 *ante p.* 24.

CHAPTER II

THE FEDERAL EXECUTIVE

(Sections 7–17)

(1) **General :** The federation of India is to consist of the Governor's provinces, the Chief Commissioners' provinces, and such states as accede to the federation. The Governors' provinces are Madras, Bombay, Bengal, United Provinces, Central Provinces, Punjab, Sind, North-West Frontier Province, Bihar, Orissa and Assam. The Chief Commissioner's provinces are Delhi, Andaman and Nicobar Islands, British Baluchistan, Coorg, Ajmer-Merwara and Panth Piploda. We shall consider the federated states and the Chief Commissioners' provinces in a separate section. The federal executive consists of the Governor-General, assisted by a reserved and irresponsible half consisting of not more than 3 counsellors, and advised by a transferred half comprising not more than 10 ministers responsible to the legislature.[37b] Dyarchy which was cast away in the provinces has thus been transferred to the centre under the 1935 Act. The Governor-General under the 1935 Act has a triple personality. In regard to certain matters he is bound by the advice of his ministers. In regard to certain other matters called individual judgment matters, he is bound to consult his ministers but he may overrule them. In certain other matters of a third type called discretionary matters he need not even consult his ministers. The Governor-General also exercises functions of the Crown in relation to Indian States called paramountcy functions. When exercising these functions he is called the Crown Representative, a new office created by the 1935 Act. The Act says that the same person can hold both offices, that of Governor-General and Crown Representative. This leads to curious situations. For example under S. 286 of the 1935 Act whenever the Crown Representative wants armed forces for discharging the functions of the Crown in relation to states, he can make a request for such forces to the Governor-General who is bound to supply them. Thus just before 15th August 1947 Lord

---

37b. In England executive power is vested in the Crown which is advised by Ministers. Under the Draft Constitution of India executive power is vested in the President who is aided and advised in the exercise of his functions by a Council of Ministers with the Prime Minister at the head. Under the Italian as well as the Czechoslovakian Constitutions of 1948 and 1920 respectively, on the other hand, the President has only enumerated powers and under the former symbolises national unity. In England until recently the Prime Minister did not exist in law and even now he is only referred to incidentally in two or three Statutes e.g. the Chequers Estate Act 1917, the Ministers of the Crown Act 1937, and the Physical Training and Recreation Act 1937. See Keith's *" The British Cabinet System "* (1939).

Mountbatten as Crown Representative could address a letter to Lord Mountbatten, Governor-General of India requesting the supply of armed forces in order to enable him to discharge his functions as Crown Representative. After 15th August 1947 paramountcy has lapsed and all the 500 and odd states of India claim to have become completely independent. The Governor-General also exercises powers of clemency etc., as an Agent of the Crown. It is necessary to differentiate clearly between the various personalities of the Governor-General to avoid confusion. The Federal Cabinet as we have already noticed consists of a reserved half and a transferred or responsible half. The reserved half consists of counsellors not more than 3 in number who are appointed by the Governor-General and to whom have been entrusted the subjects of defence, ecclesiastical affairs, external affairs and tribal areas. (S.11)[37c]. Tribal areas mean the areas along the frontiers of India or in Baluchistan which are not part of British India, or Burma or of any foreign state. The situation of these areas is such that their safety and administration is vitally related to the subject of defence and this is the reason for their being withdrawn from the control of federal ministers and entrusted to counsellors. The transferred or popular half of the Federal Cabinet consists of ministers not exceeding 10 in number.[37d] The Instrument of Instructions issued to the Governor-General gives detailed directions to the Governor-General as to how to select his team. The Governor-General is to consult the person who in his judgment is most likely to command a stable majority in the legislature and appoint persons who

---

37c. 7th Schedule:—The India Provisional Constitution (Amendment) Order, 1947, (Gazette of India Extraordinary, 26-8-1947) has in entry 1 in list 1 of the 7th Schedule substituted the words "defence, external affairs, or relations with acceding states" for the words "defence or external affairs."

37d. **The British Cabinet :** The Cabinet consists of a group of ministers—most of them heads of great departments of State—who are agreed to pursue a common policy under a common chief, the Prime Minister. The very first mention of the word "Cabinet" occurs in the Ministers of the Crown Act, 1937. The Re-election of Ministers Act 1919 provided that a member of the House of Commons should not vacate his seat by reason only of his acceptance of an office of profit if that office was an office the holder of which was capable of being elected to or sitting or voting in that House. See also the Re-election of Ministers Act 1926. The Re-election of Ministers Act 1919 provides that not more than 3 Privy Councillors at a time may be appointed ministers without any specific duties, at a salary, who may sit and vote in the House of Commons. The Ministers of the Crown Act 1937 provides that not more than 15 out of 17 Ministers may sit in the Commons. Under the House of Commons Disqualification (Temporary Provisions) Act 1941 an M.P. might be appointed to any office under the Crown and if the Prime Minister certified that the appointment was in the public interest for purposes connected with the prosecution of the War he retained his place in the Commons. See the Ministers of the Crown (Transfer of Functions) Act 1946 which provides for still greater flexibility in the allocation of the statutory functions of ministers and their departments.

collectively will be able to command the confidence of the legislature, including representatives of states and important minority communities. Professor W. P. M. Kennedy in his *'Essays in Constitutional Law'*, gives an interesting account of how merit has been given the go-by in making selections to the Canadian cabinet and how provincial, religious and racial considerations have influenced the formation of the same. To quote his words "The ministry is a balancing of interests which calls for political legerdemain of the most skilled order. The federal cabinet has thus become a strange and fortuitous Noah's Ark and is a national executive which is only national in name and is held together merely by the ties of office." To get rid of an unwanted minister there are two courses open; either the Governor-General can be advised to dismiss him or the Premier may resign and form a new cabinet with the unwanted minister left out, the latter being the more graceful method. A minister should become a member of either chamber of the legislature within 6 months after becoming minister; otherwise he ceases to be a minister. In Eire the practice of appointing non-members of the legislature as ministers was tried and it was not a success. The requirement that a minister should be a member of the legislature does not work such great hardship in practice as might appear at first sight. For example a loyal supporter might be found who would be willing to resign his seat in order to enable a defeated minister to get into the legislature. And under the 1935 Act even persons who have not even the ghost of a chance of successfully contesting an election can with constitutional propriety be ministers provided they are otherwise found indispensable, for in the federal upper house a certain number of members have to be nominated by the Governor-General and the lack of an elective seat can be made up by the minister by getting nomination. The salaries of ministers are determined by the federal legislature and cannot be varied during their term of office. Though in regard to reserved matters like defence, external affairs etc., the Governor-General is not bound under the Act, to consult the ministers since in regard to such matters he is to act in his discretion, the Instrument of Instructions enjoins the Governor-General to encourage the practice of joint consultation between his counsellors and ministers even as regards these subjects. The draft of the Instrument of Instructions is to be laid before Parliament by the Secretary of State and no further proceedings are to be taken till both Houses pray to His Majesty for the issue of the Instrument (S. 13). Parliament can also amend or revoke a previous Instrument. In the case of the Dominions His Majesty in the exercise of executive power issues these Instruments and Parliament is not associated with their issue. But in view of their importance Sir Tej Bahadur Sapru suggested that these Instruments should have parliamentary sanction behind them and this suggestion is found embodied in the Act. The Governor-

General has a number of special responsibilities like protection of minorities, protection of Services, protection of states, prevention of any grave menace to the peace or tranquillity of India, safeguarding the financial stability of the federal government etc. Where any special responsibility is involved the Governor-General exercises his individual judgment, that is he consults his ministers but may accept or reject their advice (S. 12). In the discretionary and individual judgment matters the Governor-General is under the control of the Secretary of State (S. 14). In regard to such matters the Governor also is similarly under the control of the Governor-General and hence in regard to such matters there is an indirect chain of responsibility running from the Governors and terminating in Whitehall (S. 54).

(2) **Advocate-General of India:** The Governor-General is given the assistance of two experts one financial and another legal, who are not creatures of political parties and who can be expected to bring to bear on the problems submitted to them professional wisdom and a dispassionate outlook. In regard to the appointment of the former the Financial Adviser, the Governor-General acts in his discretion (S. 14) and in regard to the appointment of the latter the Advocate-General, the Governor-General exercises his individual judgment (S. 16). Thus both these appointments have been deliberately withdrawn from the purview of party politics and ministerial patronage. The Financial Adviser is there to offer technical aid to the Governor-General to enable him to discharge his special responsibility of safeguarding the financial stability of the federation and is intended to supplement and not supplant the Finance Minister. The Advocate-General of India must be a Judge of a High Court of at least 5 years' standing or a pleader of at least 10 years' standing. He can speak in both houses of the federal legislature though he is not a member of either but he cannot vote. A similar privilege is enjoyed by counsellors and by federal ministers in respect of the chamber of which they do not happen to be members.[37e] The salaries and allowances of the Financial Adviser and of the Advocate-General of India are not votable by the legislature. Where a case involving the validity of a federal Act is pending before an inferior Court the case can, on the application of the Advocate-General of India, be transferred to the High Court.[37f]

(3) **Executive Authority of the Federation:** Lastly it remains to consider the extent of the executive authority of the federation. The general rule in the Dominions is that executive authority follows legislative authority. If a subject is included in the legislative list of a particular authority that authority also possesses the executive power in respect of that subject. But this rule is difficult to apply where there are concurrent

---

37*e*. See S. 21.

37*f*. See S. 225 (2).

powers given to two legislatures in respect of the same subject. In Australia it has been held that in regard to matters in the concurrent list the executive power vests in the states until the Commonwealth chooses to legislate in respect of that matter. The 1935 Act has solved this problem in a novel way and has made both the centre and the provinces share in the executive power in regard to matters in the concurrent list (S. 8 (1) (*a*) and proviso to S. 8 (1).) For this purpose the concurrent list has been divided into two parts. In regard to Part I of the concurrent list, the executive power vests in the provinces. In regard to Part II which comprises social and economic matters like mines, factories, workmen's compensation etc., the federal legislature can give directions to the provinces in respect of the administration of the federal laws mentioned therein (S. 126 (2) (3).) When the Centre legislates in respect of provincial subjects in an emergency under S. 102, it can by an amendment of 1939 give directions to the province as to the manner in which the executive authority thereof is to be exercised.[38]

---

38. Amendments in Ss. 7–17 :—The India Provisional Constitution Order, 1947, has made the following amendments :—

(i) In S. 7 (2) all words after "by or under this Act" have been omitted. (ii) In S. 8 (1) proviso, paras. (iii) and (iv) have been omitted. (iii) Reference to the Governor-General's discretion has been omitted in S. 9 (1) as also the proviso to S. 9 (1) and the rest of the section. There is no limit as to the maximum number of ministers (10 previously). (iv) In S. 10 (2) "either chamber of" has been omitted as also sub-S. (5). (v) Ss. 11 to 15 have been omitted. (vi) In S. 16 (2) for " British India " " any Governor's or Chief Commissioner's province " has been substituted and for " federal interests " " dominion interests ". S. 16 (4) has been omitted. In S. 17 (3) all words after " the said business " have been omitted as also S. 17 (4) and (5). Generally the India Provisional Constitution Order, 1947 has substituted " existing law " for " existing Indian law " " existing law " for " existing Indian Act " " dominion " for " federation " " dominion Government " for " federal Government " " dominion law " for " federal law " " dominion legislature " for " federal legislature " " acceding " for "federated " and " an acceding " for " a federated."

CHAPTER III

THE FEDERAL LEGISLATURE

(Sections 18–41)

(1) Composition, Life and Procedure: The federal legislature consists of the Governor-General and two chambers, the upper chamber called the Council of State and the lower, the Federal Assembly (S. 18 (1)).[38a] Under certain circumstances the Governor-General can himself function as a legislature and make ordinances and pass Acts but this is exceptional and is provided for in Ss. 42 to 44. The composition of the two chambers is given in S. 18 and the 1st Schedule to the Act. The Upper House, the Council of State consists of 156 members from British India and not more than 104 members from the federating states (S. 18 (2)). There is direct election to the federal upper chamber the electorates voting in territorial constituencies divided on a communal basis, Hindus voting for Hindus, Sikhs for Sikhs, and Muslims for Muslims. European, Anglo-Indian and Indian Christian members are elected by the members of the provincial legislature of both upper and lower houses belonging to these communities. Hence election to the federal upper house is mostly direct and in the case of Europeans etc., is indirect. 6 seats in the upper house are filled by the Governor-General by nomination. The lower house, the federal assembly consists of 250 members from British India and not more than 125 members from states (S. 18 (2)). The members are elected indirectly by the members of the provincial legislative assemblies voting in communal groups. The White Paper suggested direct election even to the federal assembly while the Joint Parliamentary Committee went to the other extreme and suggested indirect election even to the federal upper house. The Act is a compromise between these two extremes. The life of the federal assembly is 5 years but the Council of State is a permanent body one-third of whose members retire in every third year (S. 18 (4) (5)). Under the 1919 Act the life of the Central assembly was 3 years and that of the Council of State was 5 years but the Governor-General could extend the lives of both houses. The assembly which was elected in 1934 continued to function till 1946 and enjoyed 4 times its normal life. The Governor-General may in his discretion summon, prorogue and dissolve the chambers (S. 19) and address them and send messages to them (S. 20). In England there is no legal remedy if

---

38*a*. The House of Commons consists of 640 members and the Lords of 850 members. There is one member for every 50,000 of the population in the Commons, and the House of Commons (Distribution of Seats) Act 1944 has corrected anachronisms.

Parliament is not summoned to meet at least once in each year.[39] Ministers, counsellors and the Advocate-General of India can speak in either house though they are not members of the same but cannot vote in the chamber of which they are not members (S. 21). Under the 1919 Act the Advocates-General in the provinces had no right to speak in the provincial legislature but they were usually nominated. Each chamber has power to make rules governing its internal procedure. But matters involving the special responsibility of the Governor-General or his discretion are to be regulated by rules made by the Governor-General. The Governor-General may also make rules for prohibiting save with his consent the discussion of such matters as the relation between His Majesty and any foreign state, the personal conduct of the Ruler of any Indian state, or the tribal or excluded areas. English is the official language of the federal legislature but members not acquainted with English can speak in other languages. In the Irish Free State Irish is the language of the Parliament and in law courts. Where there is a difference between the English and Irish texts of the constitution the latter prevails. The federal legislature cannot discuss the conduct of any judge of the Federal Court or of the High Court. The Governor-General may also prohibit further proceedings in respect of bills which in his opinion affect the peace or tranquillity of India.

(2) Officers of Chambers and Members: By S. 22 power is given to the Council of State and the federal assembly to elect a President, Deputy President, Speaker and Deputy Speaker respectively. They vacate their office if they cease to be members, or if they resign or if they are removed by a resolution passed by a majority of the then members of the appropriate house (S. 22 (2)). For removing these officers a majority of the members present and voting is not enough.[40] The quorum for the lower house is one-sixth, that is about 63 members. Thus for other resolutions a majority of 32 out of 63 members present is enough. But for removing the Speaker or Deputy Speaker at least a majority of the

---

39. S. 19 :—The India Provisional Constitution (Second Amendment) Order, 1947, (Gazette of India Extraordinary, 6-10-47) has in sub-S. (2) of S. 19 substituted "President of the Dominion Legislature" for "Governor-General".

40. S. 22 :—The India Provisional Constitution (Second Amendment) Order, 1947, (Gazette of India Extraordinary, 6-10-47) has substituted a new sub-S. (4) to S. 22. References to the President of the Dominion Legislature except in Ss. 19 and 38 include a reference to any other person elected by the Constituent Assembly to preside over that Assembly when it functions as the Dominion Legislature. By a notification published in the Gazette of India Extraordinary 28-2-1948, the salary of the President and the Speaker of the Dominion Legislature have been fixed at Rs. 3,000/- per mensem with a sumptuary allowance of Rs. 500/- per mensem and a free fully furnished residence in New Delhi for their term of office and 15 days thereafter. These provisions take effect as regards the President from 14-1-48 and as regards the Speaker from 1-1-48. Before 1-1-48 the Speaker was paid a consolidated salary of Rs. 4,000/- per mensem.

existing members of the house, that is 188, is required. In the case of provinces also by S. 65 a majority of the then members of the provincial legislature is required to remove the Speaker or the President, and 14 days' notice of the intention to move the resolution of no-confidence has also to be given. It is interesting to compare the procedure by which the Speaker is removed with the procedure governing the removal of Judges of the Federal Court and Ministers. By S. 200 a Federal Court Judge can be removed from office by His Majesty on the ground of misbehaviour or infirmity of mind or body if the Privy Council on reference made to them by His Majesty report that the judge ought on any such ground to be removed. Under the Australian Commonwealth Constitution Act 1900, S. 71 Judges of the Commonwealth High Court shall not be removed except by the Governor-General in Council on an address from both Houses of Parliament praying for such removal on the ground of proved misbehaviour or incapacity. The South African Union Constitution Act 1909, S. 101 enacts a similar provision with this difference that it is enough if there is misbehaviour and there is no necessity for proved misbehaviour. Ministers can be dismissed by the Governor-General or the Governor as the case may be in any of the following cases: where they cease to command the confidence of the legislature, where they cease to command the confidence of the Governor-General or Governor, where it is no longer in the public interest that they should work with the Governor-General or Governor, where they advise the Governor-General or Governor to do illegal acts. The quorum for both chambers is one-sixth of the number of members (S. 23 (3.))[41] All questions other than motions of no-confidence in the Speaker etc., are decided by a majority of the members present and voting and the President or Speaker does not vote in the first instance and has only a casting vote (S. 23 (1)). This was the rule under the 1919 Act and is the practice prevailing in the lower houses in the Dominions. But in some of the upper houses in the Dominions the President has an ordinary vote and if the votes are equal the result is to negative the proposal under debate. Various disqualifications are imposed by S. 26 for being chosen as and for continuing to be a member of the federal legislature. These are lunacy, undischarged insolvency, conviction for at least 2 years, conviction for corrupt or illegal practices at elections, failure to lodge return of election expenses etc. In the case of a conviction for at least 2 years the disqualification lasts for 5 years unless it is in the meantime removed by the Governor-General who has power to do so. In the case of such a conviction the member's seat does not become automatically vacant at once but only after the expiry of 3 months, or if in the meantime an appeal has been preferred after it has been

---

41. S. 23 :—The India Provisional Constitution (Second Amendment) Order, 1948, (Gazette of India, Extraordinary, 10-2-48) has in sub-S. (2) of S. 23 substituted 1/10 for 1/6.

decided. If a person not qualified to sit or vote in the federal legislature sits or votes he shall be liable to pay a penalty of Rs. 500 for each day which will be recoverable as a debt due to the federation (S. 27). There is complete freedom of speech in the federal legislature and no member shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the legislature (S. 28 (1)). The solid advantages resulting to public interests from this uncurbed and unrestricted privilege granted to legislators more than counterbalance the harm that might possibly be done by its abuse at the hands of selfish and malicious members.[42] But this freedom of speech is not applicable to anything said by members not on the floor of the house but in the smoking-room or lobbies.[42a] The federal legislature is prohibited from conferring on either chamber the status of a court or any punitive or disciplinary powers other than a power to remove persons behaving in a disorderly manner etc. (S. 28 (3)). Provision may be made for the punishment of persons who refuse to give evidence or produce documents before a committee of the legislature (S. 28 (4)).[43] If the federal legislature likes it may pay salaries to its members (S. 29).[44]

(3) **Legislative Procedure:** Financial bills cannot originate in the upper house but other bills can originate in either chamber (S. 30 (1)).[44a] A bill pending in the lower house or which having been passed by the lower house is pending in the upper house, lapses on a dissolution of the lower house (S. 30 (5)). If the chambers disagree as to the bill there is provision made by S. 31 for a joint

---

42. In 1938 Mr. Duncan Sandys asked a question in the Commons on the anti-aircraft defences of London based on secret official information which he had obtained. The House was of the view that the sending of summons to Mr. Sandys was a breach of privilege (1938) H.C. Pap. 173.

42*a*. Parliamentary etiquette has changed with the times. In 1773 a reference to the 'heaven that witnessed the perjuries of Pitt' was held to be parliamentary. See '*Parliamentary Procedure in India*' p. 88 by Daniel Chamier (1925).

43. The India Provisional Constitution (Third Amendment) Order, 1948, (Gazette of India Extraordinary, 31-3-48) has in S. 28 substituted, "members of the House of Commons of the Parliament of the United Kingdom" for "members of the Indian Legislature".

44. The India Provisional Constitution (Third Amendment) Order, 1948, (Gazette of India Extraordinary, 31-3-48) has substituted the following for the words "allowances at such rate—Indian legislature" in S. 29 :—
"The rules relating to allowances and other matters which immediately before the establishment of the Dominion were applicable to members of the Legislative Assembly of the Indian legislature, shall apply to members of the Indian legislature, subject to such modifications as may from time to time be made therein by the Governor-General."

44*a*. The procedure on Private Bills assumes a quasi-judicial character. The proposals of the Bill have to be advertised publicly in certain newspapers. The clauses are gone through by the Select Committee before the contending parties, evidence is taken and arguments of counsel heard and amendments if necessary made.

session of both chambers to resolve the deadlock. After a bill has been passed by both chambers it shall be presented to the Governor-General who shall either assent to it or refuse assent to it or reserve it for the signification of His Majesty's pleasure or return it to the chambers with a message suggesting amendments.[44b] Even Acts assented to by the Governor-General can be disallowed by His Majesty within a year (S. 32). Under the Instrument of Instructions issued to the Governor-General he has to reserve the following classes of bills for the consideration of His Majesty: bills repealing Acts of Parliament, provincial bills affecting the Permanent Settlement which have been reserved for his consideration, bills as to which there is a doubt whether they infringe the provisions of S. 299, and bills derogating from the powers of High Courts.

(4) **Provisions for resolving Conflicts between the two houses of the Federal Legislature (S. 31):** If after a bill has been passed by one chamber of the federal legislature the other chamber rejects it, or the chambers disagree as to the amendments or more than 6 months elapse from the date of the reception of the bill by the other chamber without the bill being presented for the Governor-General's assent, the Governor-General can notify his intention of summoning them to meet in a joint session for the purpose of considering the bill. If the bill relates to finance or any matter in regard to which the Governor-General is required to act in his discretion or to exercise his individual judgment he may so notify notwithstanding that there is no rejection or disagreement or that 6 months have not elapsed. At any time in the next session after the expiration of 6 months from the date of his notification, the Governor-General may actually summon the chambers to meet in a joint sitting. In the case of financial bills and bills involving his special responsibilities the Governor-General may convene a joint session even in the same session. If the bill at the joint session is passed by a majority of the total number of members of both chambers present and voting, it shall be deemed to have been passed by both chambers. At a joint sitting only such amendments as are relevant to the matters with respect to which the chambers have not agreed shall be proposed. S. 31 can be usefully compared with S. 74 which deals with provisions for resolving deadlocks between the 2 houses of a provincial legislature. (*a*) The deadlock provisions in the case of the Centre apply to bills originating in either chamber. But in the case of provinces the deadlock provisions do not apply to bills which originate in the upper house. If a legislative council passes a bill and the legislative assembly rejects it, the rejection is final. (*b*) In the case of the federal legislature there are two periods prescribed, one period of 6 months for

---

44*b*. As to validity of Act passed by the Central Assembly on 4–2–37 by the Council of State on 6–4–37 and assented to by the Governor-General on 14–4–37 see A.I.R. (1941) F.C. 72 and (1945) F.L.J. 8 (F.C.).

the Governor-General notifying his intention to summon a joint session and the next period of 6 months at the end of which the joint session is actually held. In the provinces there is one consolidated period of 12 months. (*c*) In the case of the Centre if the bill is rejected or if there is disagreement as to amendments the Governor-General can notify his intention to summon a joint session even before the expiry of the period of 6 months. In the case of the provinces the Governor even in such cases is bound to wait for 12 months after the reception of the bill by the Legislative Council, unless the bill relates to finance or involves his special responsibilities. Because the Constituent Assembly which is exercising the powers of the dominion legislature in the interim period is a single chambered body the India Provisional Constitution Order 1947 has omitted S. 31. The same Order has also in S. 74 omitted reference to the Governor's special responsibilities. It would be interesting to compare the deadlock provisions in the 1935 Act with those found embodied in other dominion constitutions. In Canada there is no provision for deadlock save the right of the Crown which would be exercised on Canadian advice to add either 4 or 8 members in equal proportions from the four divisions of Canada in order to overcome a deadlock which has never occurred. In South Africa in the case of financial bills there can be a joint session in the same session if there are two disagreements; in the case of other bills there can be a joint session only after the bill has been rejected in two sessions. In any case in South Africa with an upper house of 44 containing 8 nominated members and a lower house of 153 it is not difficult to predict what the result of a joint sitting of both chambers is likely to be.[44c]

(5) Powers of the two Houses in regard to Finance and Financial Bills: (*a*) *Finance:* In regard to the budget the powers of the two houses of the federal legislature are equal. By S. 34 (2) the demands for grants are put before both the federal assembly and the Federal Council of state. In the provinces, on the other hand, by S. 79 (2) the demands for grants are put only before the lower house and the upper house has nothing to do with them, a practice which prevailed also under the 1919 Act. (*b*) *Financial Bills* : In the case of many of the dominion legislatures like the Commonwealth legislature or the legislature of South Australia, the upper house cannot amend financial bills though it can suggest amendments, which might or might not be accepted by

---

44*c*. In the English Constitution the Parliament Act 1911 has wholly abolished the Lords' veto over money bills and substituted for their absolute veto over other legislation a suspensive veto of 2 years. The Government of Ireland Act, 1914, and the Welsh Church Act, 1914, received Royal Assent in accordance with the above provisions. The Bill to reduce from two years to one the suspensive veto of the Lords was passed by the Commons on 21–9–48 and rejected by the Lords on 23–9–48.

the lower house. In the case of the Irish Free State the Senate, the upper house though it cannot amend money bills can make recommendations to the lower house, the Dail, within 21 days. S. 30 (2) of the 1935 Act makes the powers of the two chambers of the federal legislature equal in regard to financial bills with the single exception made by S. 37 which says that financial bills, that is to say bills imposing taxation, etc., shall not originate in the upper chamber. The White Paper proposed to slightly curtail the powers of the upper house in regard to finance. It proposed that the upper house's powers in regard to demands for grants should be limited to requiring a joint session for demands rejected or reduced ; in other words, the upper house could not reject any demand assented to by the lower house, but the Joint Parliamentary Committee did not approve of this suggestion. The India Provisional Constitution Order 1947 has substituted 'Dominion legislature' for 'federal assembly' and 'Council of State' in S. 34.

(6) **Budget Procedure:** The non-votable items in the budget form about 90% of the same and include the salary of the Governor-General, salaries of Ministers, Counsellors, Advocate-General, salaries and pensions of Federal Court Judges and pensions of High Court Judges, expenses in relation to defence, the tribal areas, ecclesiastical affairs, external affairs, sums payable to the Crown Representative etc., S. 33 (3). Except the salary of the Governor-General and the sums payable to the Crown Representative all the other non-votable items can be discussed in the legislature. Where the chambers disagree as to the demands for grants they shall meet in a joint sitting to resolve such difference (S. 34 (3)). Where a demand which affects the due discharge of any of the special responsibilities of the Governor-General is rejected or reduced the Governor-General may restore the rejected demand or the amount reduced. (S. 35 (1) proviso). By the India Provisional Constitution Order 1947 the sums payable to the Crown Representative have been removed from the list of non-votable items as also defence, external affairs etc., expenditure and expenditure in connection with excluded areas. By the same Order the provision for a joint session in case the two chambers disagree as to demands for grants has been abolished.[44d]

44*d*. Amendments to Ss. 18–41.—The India Provisional Constitution Order, 1947, has made the following amendments :—

(i) In S. 18 it is provided that until other provision is made by the Constituent Assembly under S. 8 (1) of the Independence Act, 1947, it shall exercise the powers of the Dominion legislature. This change is effected by substituting a new section for the old one. (ii) Because the Constituent Assembly is single chambered all references to " Chambers of " " either Chamber of " " chambers " have been omitted. (iii) Ss. 19 (3), 22 (1) (2) (3) and (5), 24, 25, 26, 27, 28 (3) (4), 31, 32 (2) (3), 33 (4), 34 (3), 38 (2) (4), 39, 40 (2) have been omitted. In S. 22 (4) for " and the Deputy President of the Council of State " " of the dominion legislature " has been substituted, as also " salary " for " salaries " and " respectively " is omitted. (iv) For S. 30 a new section has been substituted which prevents bills pending in the

(7) Constituent Assembly: After 15th August 1947 and until India gets a new constitution the Constituent Assembly is exercising the powers of the dominion legislature. So it fulfils a dual role combining in itself both constitution making and legislative functions in the interregnum. The Cabinet Mission plan of 16th May 1946 was strongly against Pakistan and suggested a single constitution-making body for the whole of India on the following basis : Each province was to be allotted a total number of seats proportional to its population roughly in the ratio of one to a million, this allocation of seats on a provincial basis was to be divided between the main communities in each province in proportion to their population and representatives allotted to each community in a province were to be elected by the members of that community in its legislative assembly. There was to be an Indian Union dealing with foreign affairs, defence and communications. Provinces were to be free to form groups with executives and legislatures and each group could determine the provincial subjects to be taken in common. Madras, Bombay, U.P., C.P., Bihar and Orissa formed Group A. Punjab, N.W.F.P. and Sind formed Group B and Bengal and Assam formed Group C. Provinces were also to be given the power of opting out of any group after the first elections under the new constitution. Under this plan the total number of members to the Constituent Assembly from British India was 292 and from the states a maximum of 93. But even though the Constituent Assembly was formed on the basis of the May 1946 plan it did not function according to the scheme laid down therein due to unexpected developments. In June 1947 the two major Indian political parties agreed to a division of India and thus India and Pakistan had separate Constituent Assemblies.[45] The present strength of the Indian Constituent Assembly excluding states is 226. Under the Cabinet Mission plan of 1946 the Centre was to be weak and anæmic but now after division the Constituent Assembly of India is planning a strong Centre.

Legislative Assembly of the Indian Legislature immediately before the establishment of the Dominion from lapsing. (v) In S. 33 (2) all words after " from other expenditure " have been omitted. (vi) In S. 33 (3) (*c*) the word " counsellors " has been omitted as also " financial adviser." (vii) S. 34 (2) proviso has been omitted as also S. 35 (1) proviso. (ix) S. 35 (3) has been enlarged so as to enable the Governor-General to authenticate expenditure by order from 15-8-47 to 31-3-48. (x) In S. 37 (1) all words after " Governor-General " have been omitted. (xi) In S. 38 (1) the proviso has been omitted. (xii) In S. 38 (3) after " with respect to " " the Legislative Assembly of " has been inserted.

45. Under the Cabinet Mission Proposals of 16-5-1946 the total number of members from British India to the Constituent Assembly was to be 187 from Group A, 35 from Group B, and 70 from Group C. To Group A were to be added 3 members representing Delhi, Ajmer-Merwara, and Coorg and to Group B a representative from British Baluchistan (making a total of 295). Under the 3-6-47 plan the following quota was assigned to the provinces in Pakistan ;—E. Bengal 41, W. Punjab 17, Sylhet 3, N.-W.F.P. 3, Sind 4, Br. Baluchistan 1.

CHAPTER IV

THE FEDERAL COURT

(Sections 200–218)

Since federalism in the words of Dicey is the triumph of legalism a federal system always presupposes a court to safeguard and interpret the constitution. But the court should only act as the watch-dog and not degenerate into a bloodhound by giving unnatural and artificial interpretations and nullifying all creative and useful endeavour.

(1) Appointment, Removal, Salaries etc., of Judges: The maximum number of judges (excluding the Chief Justice) in the Federal Court is 6 unless the federal legislature presents an address to the Governor-General for submission to His Majesty praying for an increase in the number of judges (S. 200 (1)). The court began work in October 1937 with 3 judges. The qualification for appointment as a judge is 5 years' standing as a High Court Judge in British India or a federated state, or 10 years' standing as a barrister or advocate. The Chief Justice should be a barrister or advocate of at least 15 years' standing (S. 200 (3)). A judge may resign his office or if the Privy Council on reference made to them by His Majesty certify that the judge has misbehaved or is infirm in mind or body, he may be removed by His Majesty. Judges retire at 65. (S. 200 (2)). When the office of Chief Justice is vacant the duties of Chief Justice shall be performed by one of the judges of the court appointed for that purpose by the Governor-General (S. 202). When a judge is unable to perform the duties of his office, the Governor-General shall appoint a judge of a High Court qualified to be appointed as a judge of the Federal Court to fill the temporary vacancy (S. 202 (2) newly added by the India & Burma (Miscelleneous Amendments) Act 1940, (3 & 4 Geo. VI, C. 5)). Where a judge of the Federal Court has a personal interest in the decision of any particular case which may come up before the court and without that judge there is no sufficient quorum for the sittings of the court the Governor-General may appoint a High Court judge qualified for appointment as a judge of the Federal Court, to act temporarily as a judge of the Federal Court until the hearing of such case by the Federal Court. This amendment which was introduced by the India (Federal Court Judges) Act 1942 (5 & 6 Geo. VI, C. 7) was necessitated by the fact that Justice Sir Mahomed Zafrullah Khan had a personal interest in a case which came before the court and that the court consisting of 3 judges could not act without him. Parliament amended the Act by adding a new sub-s. (3) to S. 202 and in place of Zafrullah Khan, Sir John Beaumont the Chief Justice of Bombay was appointed temporarily as a Judge of the Federal Court under

this section. The Federal Court has the power to make orders for the purpose of securingthe attendance of witnesses, production of documents, and to award punishment for contempt of court in British India and the federated states. The law declared by the Federal Court is binding on all courts in British India and if it involves the interpretation of the 1935 Act or an Order in Council or any matter in respect of which the federal legislature has power to make laws for the state, it is binding on the courts in the federated states as well. The administrative expenses of the Federal Court shall be charged upon the revenues of the federation and shall not be votable. The Federal Court exercises three main kinds of jurisdiction, original, appellate and advisory. We shall consider each of these in turn.

(2) **Original Jurisdiction :** Subject to exceptions the Federal Court has original jurisdiction in any dispute between any two or more of the following parties, that is to say, the federation, provinces, federated states, which involves a question of law or fact on which the existence or extent of a legal right depends. Where a state is a party the jurisdiction arises only if any one of the following conditions exists : (*a*) the dispute should involve the interpretation of the 1935 Act or an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the federation; (*b*) it should concern some matter with respect to which the federal legislature has power to make laws for that state; (*c*) there should be an agreement between the state and the federation or province made with the approval of the Crown Representative which expressly provides that the said jurisdiction shall extend to such dispute, and the dispute should arise under such an agreement (S. 204). Where a dispute arises under an agreement which expressly provides that the said jurisdiction shall not extend to such dispute the Federal Court has no jurisdiction.[46] S. 133 expressly takes away the jurisdiction of the Federal Court and of other Courts in disputes relating to water from natural sources of supply between provinces and federated states. The original jurisdiction of the

---

46. S. 204 (1) only invests the Federal Court with jurisdiction in disputes between any two or more of the following parties *viz.*:—The dominion, provinces and acceding states, A state cannot be described as an acceding state unless the Governor-General has signified his acceptance of the Instrument of Accession executed by the Ruler thereof. A mere willingness on the part of the state to accede to the Indian Union and its being prepared to sign the Instrument of Accession at any time it is forwarded to it for signature, is obviously insufficient to bring it within the definition of an " acceding state". The Federal Court is not invested with jurisdiction merely because no other Court in the land is competent to deal with questions of the kind raised in the present case. The use of the word " acceding state " in S. 204 (1) and the use of the word " state " in the proviso to S. 204 (1) do not have the effect of widening the Court's jurisdiction so as to extend it to non-acceding states in respect of disputes covered by the proviso—*per* Patanjali Sastriar, J. in *Ramgarh State* v. *Province of Bihar* (1948) 11 F.L.J. 9 (F.C.).

Australian High Court is wider and by S. 75 of the Australian Constitution Act extends to the following matters (*a*) arising under treaty, (*b*) affecting consuls, (*c*) in which the Commonwealth or a person suing it or being sued is a party, (*d*) between states or residents of different states or beween a state and the resident of another state, (*e*) in which a writ of *mandamus* or *prohibition* or injunction is sought against a Commonwealth officer. The United States Supreme Court has original jurisdiction in matters involving ambassadors or ministers and those to which a state is a party. There may be a dispute involving a question on which the existence of a legal right depends within the meaning of S. 204 (1) notwithstanding the fact that the dispute arose under the 1919 Act and concerned the interpretation of the legislative lists under it and notwithstanding the fact that under the said Act the provinces could not have sued the federation in a court of law because of the unitary nature of the constitution which prevailed before the 1935 Act. This was decided in *United Provinces* v. *Governor-General in Council*.[47] In cases involving constitutional questions between a Dominion and a province the usual practice of the Privy Council is not to make any order as to costs. The Australian practice is the same. No doubt in *Governor-General in Council* v. *Province of Madras*,[48] the Federal Court made an order as to costs but it is submitted that even in regard to costs incurred in the Federal Court in cases arising under its original jurisdiction the same rule should be followed and no costs awarded. The law to be applied by the Federal Court in determining cases falling within its original jurisdiction presents a difficult question. The answer is furnished by the judgment of the Supreme Court of the United States in *Kansas* v. *Colorado*[49] where it is said: 'Sitting as it were as an international as well as a domestic tribunal we apply federal law, state law and international law as the exigencies of the particular case may demand.' By the India Provisional Constitution Order 1947, where the original jurisdiction of the Federal Court arises under an agreement between the federated state and the dominion or a province the agreement need not be made with the approval of the Crown Representative because the office of Crown Representative has been abolished with the liquidation of paramountcy from 15th August 1947. Where the agreement is with a province the agreement has to be made with the approval of the Governor-General under the said Order.

(3) **Constitutional Appellate Jurisdiction:** By S. 205 an appeal lies to the Federal Court from a judgment, decree or final order of a High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of the

---

47 A.I.R. (1939) F. C. 58.
48 (1943) F. L. J. 1 (P. C.).
49 (1901) 185 U.S. 148.

1935 Act or an Order in Council made thereunder. Even if the High Court refuses to grant leave perversely no appeal lies from such an order. The word ' judgment ' includes judgment in a criminal case either of conviction or of acquittal but does not include an interlocutory order in a criminal case. Once the High Court has granted leave it cannot afterwards revoke it on the ground that circumstances have changed. Where the High Court has not applied its mind at all to the question of granting or withholding a certificate and the case involves a substantial question of law regarding the interpretation of the 1935 Act it was held in *Punjab Co-operative Bank* v. *Income-tax Commissioner*[50] that the Privy Council should adjourn the appeal until the High Court has either given a certificate or withheld it. The word 'judgment' includes a reference under S. 432 of the Criminal Procedure Code. In *Kunwar Lal Singh* v. *C. P.* and *Berar*[51] the Federal Court has held that where a single judge of a High Court has given a decision involving an interpretation of the 1935 Act an appeal lies under S. 205 to the Federal Court notwithstanding the fact that an appeal lies to a bench of the High Court from the judgment of the single judge. The judgment of a single judge is final though appealable to a bench of the same court. The test to find out whether a substantial question of law is involved is to inquire whether the fate of the case depends upon that question. If it does not, then however important the question might be by itself it is not deemed to be involved in the case. This was held in *Hafiz Mohammad* v. *Shiam Lal.*[52] By the India Provisional Constitution Order 1947 the words 'British India' have been omitted from S. 205 and now an appeal lies to the Federal Court also in cases involving a substantial question of law as to the interpretation of the Indian Independence Act 1947 or an Order made thereunder. By S. 207 an appeal lies to the Federal Court from a judgment of a High Court in a federated state if it involves a question of law concerning the interpretation of the 1935 Act or an Order in Council made thereunder or the extent of the legislative or executive authority vested in the federation by virtue of the Instrument of Accession of that state or arises under an agreement made in relation to the administration in that state of a federal law. By the India Provisional Constitution Order 1947 an appeal lies from a High Court in a federated state to the Federal Court also in cases involving an interpretation of the Indian Independence Act 1947 or an Order made thereunder.[52a]

---

50 A.I.R. (1940) P.C. 230. 51 (1944) F. L. J. 178 (F. C.).
52 (1944) F. L. J. 261.

52 (*a*). Though an application for a certificate of the nature mentioned in S. 205 can be filed even after the judgment has been pronounced by the High Court in the case it can be filed only when the High Court has erred in not considering the question of the granting or withholding of the certificate—*Jagdam Sahai* v. *Emperor* (1947) A.L.J. 482. Where before the High Court a question as to the interpretation of the 1935 Act is not raised a subsequent application for leave under S. 205 would not lie on such a point—*Motilal* v.

(4) Civil Appellate Jurisdiction: The question whether India should have a Supreme Court with final appellate authority over all the High Courts displacing the Privy Council has had a long and controversial history. The White Paper proposed that there should be a Supreme Court for the whole of India hearing appeals from all High Courts in all civil cases and in criminal cases only where a death sentence had been passed. There was also to be a Federal Court dealing with constitutional cases. There were still to be appeals to the Privy Council with the leave of the Supreme Court or of the Privy Council. The Joint Parliamentary Committee in their Report (paras. 329 and 330) were of the view that the setting up of two such courts with co-ordinate and rival jurisdictions would lead to undignified and undesirable disputes between the two and so they were not in favour of two such courts. On the other hand they favoured the extension of the jurisdiction of the Federal Court to include also the hearing of appeals in civil cases from High Courts. The Federal Court was to sit in two chambers one to hear constitutional cases and the other to hear civil appeals from High Courts. The two chambers would be distinct but judges from one chamber might be made to sit occasionally in the other chamber to emphasize the unity of the court. The Joint Parliamentary Committee was against giving criminal appellate jurisdiction to the Federal Court. Because as they pointed out, an accused sentenced to death by a Sessions Judge in the mufassal can appeal to the High Court and the sentence cannot be carried out till it is confirmed by the High Court. In cases within the original criminal jurisdiction of the presidency High Courts also the interests of the accused were sufficiently safeguarded. He

---

Emperor (1947) A.L.J. 485. Where to the extent to which any guidance might be needed for the purposes of a case on the interpretation of a section of the 1935 Act guidance has been furnished so far as the Federal Court is concerned by a prior decision of that Court, there is no ' substantial question of Law ' as to the interpretation of the 1935 Act involved in such case which could form the basis of a certificate under S. 205 (1) of the 1935 Act—*Krishnaswami Pillai* v. *Governor-General in Council* (1947) 2 M.L.J. 400 (F.C.).

An order of the High Court negativing objection as to the maintainability of criminal proceedings (that the High Denomination Bank Notes (Demonetisation) Ordinance 3 of 1946 is no longer in force and prosecutions cannot lie for anything done in contravention of it) is not a ' judgment, decree or final order of a High Court' as to attract the provisions of S. 205 (1) and an appeal from such an order to the Federal Court is not maintainable. *Pandit Sridhar Achari* v. *The King* (1947) F.L.J. 117 (F.C.). An objection to the maintainability of a criminal prosecution was raised on the ground that the consent of His Excellency the Governor was necessary under S. 270 (1) of the 1935 Act but was not obtained. It was overruled and a revision petition filed in the High Court against that order was dismissed. Held the order of the High Court was not a ' judgment ' because it was only an interlocutory order made on a preliminary objection in the course of a criminal trial. It was also not a 'final order' as the order was not on a point which decided either way would terminate the matter before the court finally. Even where a certificate under S. 205 is granted the Federal Court can enquire whether the appeal is from "a judgment, decree etc"—*Kuppuswami Rao* v. *The King* (1948) 1 M.L.J. 103.

could file a petition to the Government for remission or commutation of the sentence and could also appeal to the Privy Council by way of special leave and apply for a review on the certificate of the Advocate-General. Now by an amendment to the Criminal Procedure Code made by Act 26 of 1943 a new section S. 411-A has been added under which an accused sentenced by a judge in the original side of the High Court exercising criminal jurisdiction can appeal from such sentence as of right. Under these circumstances the J.P.C. thought that no useful purpose would be served by converting the court not merely into a court of civil appeal but also into a court of criminal appeal and thus giving the accused one more chance of, as has been described " trying his luck." The view of the J.P.C. has been adopted in the Act and S. 206 empowers the federal legislature to confer on the Federal Court appellate jurisdiction over the judgments of High Courts in British India where the value of the subject-matter of the dispute involved is not less than Rs. 50,000 or such other sum not less than Rs. 15,000 as may be specified by the federal legislature, or where the Federal Court gives special leave to appeal. Where the Federal Court is invested with such enlarged appellate jurisdiction direct appeals to the Privy Council may be abolished in such cases. Bills for investing the Federal Court with such enlarged jurisdiction can be introduced only with the previous sanction of the Governor-General in his discretion.[53] By the India Provisional Constitution Order 1947 the condition that the appeal should be of the value of at least Rs. 50,000 or such other sum not less than Rs. 15,000 as may be specified by the federal legislature has been taken away. Though the federal legislature possessed this power to invest the Federal Court with these enlarged powers and though various attempts were made from time to time to bring the section into operation none of these efforts succeeded. About 1940 the Bar throughout India was very keen on applying S. 206 and making the Federal Court a real Supreme Court for the whole of India exercising appellate powers over all the High Courts. But this enthusiasm was not shared by the British Government whose mind was preoccupied

---

53. The Federal Court (Enlargement of Jurisdiction) Act 1 of 1948 lays down that in the case of a judgment, decree or final order of a High Court in a civil case from which a direct appeal could have been brought to His Majesty in Council either with or without special leave if this Act had not been passed, an appeal shall lie to the Federal Court from such judgment without special leave of the Federal Court if an appeal could have been brought to His Majesty in Council without special leave, and with special leave of the Federal Court in other cases. No direct appeal shall lie to His Majesty in Council either with or without special leave from any such judgment. The Act came into force on 1-2-48 and does not affect appeals pending before the Privy Council on that date, if the records pertaining to such appeal have before that date been transmitted by the High Court. An order passed by the High Court under S. 491, Cr. P. C. is not an order passed in its civil jurisdiction and no appeal lies to the Federal Court—In re *Venkatachala Thevar* (1948) 2 M.L.J. 76.

with the problems of World War II which had just then begun. The Government came back to the question again about 1943 and offered to put S. 206 into operation under certain conditions which proved very distasteful to the whole Indian Bar. The condition was that in such cases the litigant should have an option of appealing either to the Privy Council or to the Federal Court. It was thought that this option would prove to be very detrimental to the dignity and popularity of the Federal Court and so the proposal fell through.

(5) Advisory Jurisdiction of the Federal Court: S. 213 empowers the Governor-General in his discretion to refer to the court for its opinion questions of law of public importance on which it is expedient that the opinion of the court should be obtained. The court has to make a report to the Governor-General after hearing the same. The report shall be in accordance with the opinion of the majority of the judges delivered in open court but dissenting opinions may also be delivered.[53a] In Australia the High Court has not favoured the giving of advisory opinions. The view prevalent there is that the judiciary should concern itself with the decision of matters *inter partes* and not the consideration of abstract legal questions. In America also when President Washington propounded certain questions to the United States Supreme Court it declined to answer them. In Canada it has been held obligatory on the part of the Dominion Supreme Court to answer questions of law or fact put to it by the Governor-General in Council. The Canadian New Deal was hatched by a Government and nurtured by the Supreme Court and the Privy Council. No doubt sometimes it is impossible to answer effectively vague or complex issues but the total absence of the power in Australia is inconvenient. By S. 102 of Act No. 46 of 1935 the Supreme Court of the Union of South Africa may make declarations regarding future or contingent rights but it will not readily do so. There have been 4 references so far to the Federal Court under this section.

The first was in 1939 in a case where the Governor-General asked for the Federal Court's opinion on the validity of the C.P. Petrol and Motor Lubricants' Taxation Act. The second reference concerned the validity of the Hindu Women's Right to Property Act of 1937, the third had reference to the question as to whether lands and buildings in Chief Commissioner's provinces belonged to the federation or the provinces, and the fourth concerned the power of the federal legislature to levy estate duty. By S. 4 of the Judicial Committee Act 1833 it shall be lawful for His Majesty to refer to the Privy Council any such matters as His Majesty shall think fit and thereupon the Privy Council shall consider and hear such matter. In April 1928 when the Rating and Valuation Bill

---

53*a*. In the U.S. Supreme Court in 1943 there were dissenting opinions in 44 per cent of the cases and in 1944 in 63 per cent. of the cases.

was in the House of Lords a protest was made against a clause in the bill which empowered the Minister of Health to consult the High Court on substantial questions of law. Professor Frankfurter (now judge of the U.S. Supreme Court) has criticised the giving of advisory opinions severely. In his view advisory opinions move in an unreal atmosphere and the impact of actuality and the intensities of immediacy are wanting. Advisory opinions are rendered upon sterilised and mutilated issues. An advisory opinion is a ghost but it is a ghost which has the power to slay. As Professor C. K. Allen has correctly pointed out an advisory opinion is either mere opinion or a judgment disguised as an opinion. In the former case there is no advantage of imposing an additional duty on the judges. In the latter case it is open to the objection that it is anticipatory of actual facts. In either case an advisory opinion is either superfluous or mischievous.[53b]

(6) Appeals to the Privy Council from the Federal Court : By S. 208 appeals lie to the Privy Council from judgments of the Federal Court in the exercise of its original jurisdiction if they involve interpretation of the 1935 Act or an Order in Council made thereunder or the Independence Act 1947 or the extent of the legislative or executive authority of the federation etc., as of right and in other cases with the leave of the Federal Court or of the Privy Council. The tendency till recently was for the Federal Court to refuse leave to appeal to the Privy Council in constitutional cases except where its judgment was not unanimous. The idea was that litigants should not be encouraged to seek a determination of constitutional questions elsewhere than in the Federal Court. The Federal Court will not grant leave except in cases of real importance which are likely to affect a large number of interests in the future or cases in which difficult questions of law are involved. In recent years the Federal Court has become more liberal in the matter of granting leave to appeal to the Privy Council. By S. 74 of the Australian Constitution Act from decisions of the Commonwealth High Court as to the limits *inter se* of the constitutional powers of the Commonwealth and of the states, no appeal lies to the Privy Council unless the Commonwealth High Court grants leave and in practice it always refuses leave in such cases.

(7) Letters of Request: Under S. 211 the Federal Court can send letters of request to Rulers of federated states in cases where it requires a case to be stated under S. 207 or requires the aid of the civil or judicial authorities in that state. "Letters of request" is a phrase used when one sovereign ruler has to make a communication to another with regard to the performance of some act necessary for the administration of justice in the first of the two countries.

53*b*. See (1944) F.L.J. 215 (F.C.) and Kautilya in (1944) F.L.J. 131.

(8) Miscellaneous : By S. 209 where the Federal Court allows an appeal it shall remit the case to the lower court with a declaration as to the judgment which should be substituted for the judgment of the lower court. All authorities civil and judicial throughout the federation shall act in aid of the Federal Court. The Federal Court with the approval of the Governor-General in his discretion can make rules for regulating the practice and procedure of the court. The federal legislature may also confer on the Federal Court supplemental powers not inconsistent with the 1935 Act.[54]

---

54. Amendments to Ss. 200 to 218 :—The India Provisional Constitution Order, 1947, has made the following amendments :—

(i) For " His Majesty " " Governor-General " has been substituted and a resolution of the dominion legislature is enough ; and no address is necessary, in S. 200 (1). In S. 200 (3) the expression " High Court " also includes the "High Court of an acceding state."(ii) In S. 201 "Governor-General" has been substituted for " His Majesty in Council." (iii) In S. 204 (1) proviso (*a*) (i) the Federal Court has also jurisdiction now if the matter involves an interpretation of an Order made under the 1935 Act after 15-8-47 or of the Independence Act, 1947, or of an Order made thereunder. A similar change has been made in Ss. 205 (1), 207 (1) and 208 (*a*). (iv) In S. 206 (1) " British India " and all words after " certificate as aforesaid " have been omitted. In S. 206 (2)" " British India " has been omitted and in S. 206 (3) " either chamber of" has been omitted. (v) In S. 210 (2) "as respects British India and the federated states" has been omitted as also "In British India." "A Governor's Province or Chief Commissioner's province or " has been substituted for " British India or of any." (vi) S. 216 (2) has been omitted. (vii) For " His Majesty " in S. 217 " Governor-General " has been substituted. (viii) In S. 218 " British India " has been omitted and for " Outside British India " " Outside India " has been substituted.

CHAPTER V

THE FEDERAL RAILWAY AUTHORITY

(Sections 181–199)

(1) **Federal Railway Authority:** The topic of the federal railway authority is dealt with in Ss. 181 to 190 of the Act, and the 8th Schedule. All these Ss. 181 to 199 and the 8th Schedule have been omitted by the India Provisional Constitution Order 1947. In June 1933 the Secretary of State for India constituted a committee to submit proposals for the future administration of Indian railways. The committee was divided in its opinion as to whether all the members of the railway authority should be appointed by the Governor-General on the advice of the federal government and as to whether it should be constituted on a communal basis. The Act following the recommendation of the J.P.C. report has provided that 3 out of the 7 members of the authority should be appointed by the Governor-General in his discretion and that there should be no reservation of seats for Europeans and Muslims. Only persons having experience in commerce, industry, agriculture, finance or administration are eligible to be appointed as members. Persons who within the preceding year have been members of the federal or provincial legislature or servants of the Crown in India or railway officials are ineligible. The term of office of the members is 5 years except 3 members of the first authority who hold office for 3 years. The members are eligible for reappointment and the Governor-General in his individual judgment can terminate the appointment of members. All questions are decided by a majority of the members present and voting. Temporary members are appointed in accordance with rules made by the Governor-General exercising his individual judgment. If a member holds a contract in respect of railway works or becomes concerned in the management of a railway holding such a contract, he shall not take part in any discussion respecting such contract. A person deputed by the Governor-General may speak but not vote at meetings of the Authority. The proceedings of the Authority are not invalidated by any vacancy in their number. The Chief Commissioner of Railways is appointed by the Governor-General exercising his individual judgment after consulting the Authority. The Financial Commissioner for Railways is appointed by the Governor-General after consulting his ministers. The Chief Railway Commissioner can be removed from office by the Authority only with the approval of the Governor-General exercising his individual judgment. The Chief and Financial Commissioners can attend meetings of the Authority. The Authority is not liable to pay income or supertax and must entrust all

moneys not immediately needed to the Reserve Bank. The 8th Schedule can be repealed or amended by the federal legislature only with the previous sanction of the Governor-General given in his discretion. The requirement that at least 3 members of the Authority should be appointed by the Governor-General in his discretion cannot be amended by the federal legislature even with the previous sanction of the Governor-General. The executive authority of the federation in regard to the construction, maintenance, and regulation of railways is by S. 181 to be exercised by the federal railway authority. This authority extends also to the carrying on of operations ancillary to the business of constructing, maintaining, railways such as running of road services and working of collieries to supply the coal requirements of the railways. Functions in regard to the securing of the safety of the public and of railway servants including the holding of enquiries into the causes of accidents shall be performed by federal officers independently of the Authority. By S. 183 in discharging its functions the Authority shall act on business principles, pay due regard to the interests of trade, commerce, agriculture, industry etc., and be guided by the instructions of the federal government on questions of policy. The functions of the Authority in regard to matters entrusted to it shall be deemed to be functions of ministers and the Governor-General can exercise his individual judgment and act in his discretion in regard to such functions in so far as he is required by the Act to do so. By S. 184 the Governor-General exercising his individual judgment and after consulting the Authority can make rules for the conduct of business between the Government and the Authority. It shall be the duty of the Authority to bring to the notice of the Governor-General any matter involving or likely to involve his special responsibilities. By S. 185 except when regulations of the federal government otherwise provide, the Authority cannot acquire or dispose of any land and only the federation can acquire such land on behalf of and at the expense of the Authority. Contracts made on behalf of the Authority can be enforced only by the Authority and not by the federation. The Authority may enter into working agreements with any State or any person owning or operating any railway in India. By S. 186 the Authority has to maintain two funds, a railway fund and a provident fund. Surplus on revenue account shall be divided between the federation and the Authority in accordance with a scheme to be prepared, reviewable from time to time by the federal government. By S. 187 moneys provided out of the revenues of the federation or of India for capital purposes in connection with railways in India shall be treated as a debt due by the Authority. Debts, damages etc., in connection with proceedings against the Secretary of State for India or the federation arising out of railway matters defrayed out of the revenues of the federation have to be repaid to the federation by the Authority. Expenses incurred by an Indian State

or a province for the provision of police to maintain order on federal railway premises have to be paid by the Authority to the province or State. Moneys not for the time being required to meet expenses can by S. 188 be invested in the railway fund or provident fund. Moneys held by the Governor-General immediately before the establishment of the Authority on account of depreciation fund, reserve fund or provident fund cannot by S. 189 be required by the Authority to be transferred to it except such portions of the fund as are required to defray expenditure chargeable against such funds. By S. 190 the accounts of the Authority shall be audited by the Auditor-General of India. The Authority shall publish annually a report of their operations during the preceding year as also a statement of accounts in a form approved by the Auditor-General.

(2) **Railway Rates Committee:** By S. 191 the Governor-General may from time to time appoint a railway rates committee to give advice to the federal railway authority regarding disputes between users of railways and the Authority as regards rates or traffic facilities. Formerly under the Indian Railways Act 9 of 1890 there was to be a Railway Commission consisting of a High Court Judge and 2 lay Commissioners appointed by the Governor-General in Council to hear complaints against railways of failure to give traffic facilities, undue preference etc. In 1899 a travelling commission sat in Madras to consider the point at which the new through line between Madras and Calcutta was to be divided for purposes of management and control and settled Vizagapatam as the point of division. In 1926 on the suggestion of the Acworth Committee a railway rates advisory committee was constituted for the investigation of complaints regarding rates. It was a purely advisory body whose reports had no effective value unless accepted by the Railway Board. The member representing railway interests on the committee was an officer with experience of railway rating problems and the member representing commercial interests was selected by the Government of India separately for each case, referred to the committee for investigation, from a panel elected or nominated by the principal commercial bodies. There was also a President. The headquarters of the committee is Calcutta but the committee may conduct its investigations at other industrial or commercial centres also. The procedure is that the applicant sends a signed application for reference of the dispute to the Government of India railway department. The application is to be accompanied by a deposit of Rs. 10. Within 2 months the Agent of the railway concerned prepares a case and if on perusing it the Government of India is of the opinion that the matter need not be referred to the rates committee it informs the applicant accordingly. The rates committee is an advisory body and not a court. It cannot administer an oath or summon witnesses, nor award damages nor deliver its own judgment in public without the ratification of the Railway Board.

But because the committee deals with matters of a judicial character the adoption of legal procedure has become almost inevitable and the committee may with the consent of the parties order any point of law to be disposed of before the hearing of the application. Railways not parties to the application who are likely to be affected by the recommendations made by the committee may also be added as parties. To show that a rate is unreasonable it has to be compared with a rate which has been recognised as reasonable. A rate is presumed to be reasonable if it has been in force for a fairly long time or it has been judicially declared to be reasonable. Rates in force on 1st January 1920 in America and on 1st January 1892 in England have been declared by statute to be reasonable. There is no such provision in India. In England there is a body known as the Railway and Canal Commission. It consists of 2 lay members and a Judge of the English or Scottish High Court. Appointments to it are made by the Home Secretary because the Minister of Transport is likely to be a party before it. The commission had jurisdiction as regards undue preference, failure to afford traffic facilities, rates etc. Even now the Commission exercises its jurisdiction as regards complaints relating to undue preference. But its functions in relation to rates have been taken over from 1928 by a new body the Railway Tribunal under the Railways Act 1921. The tribunal consists of one railway man, one commercial man and one lawyer. The functions of the tribunal are the following: fixing standard rates for the conveyance of merchandise, settling fares for passengers on rail owned ships, determining whether conditions as to packing are reasonable etc. From the decisions of the tribunal an appeal lies on a question of law to the Court of Appeal and if the Court of Appeal is divided in its opinion it may give further leave to appeal to the House of Lords. There are two panels a traders' panel nominated by the Minister of Transport after taking the advice of associations such as federations and chambers of commerce and agriculture and the other the railway panel nominated by the Minister of Transport after taking the advice of railway companies' associations. Whenever required by the parties or whenever the permanent members of the tribunal think fit, the tribunal for the hearing of any particular case may be increased by the addition of 2 members one from the traders' panel and the other from the railway panel. The differences between the Railway and Canal Commission and Tribunal of England and the Rates Committee and Tribunal in India may be noted. Both the Railway and Canal Commission and the Railway Tribunal in England are statutory bodies the former dealing with undue preference etc., and the latter with rates. In India, on the other hand, even though the rates committee hears complaints both in regard to undue preference and in regard to rates, it is not a statutory body whose decisions have a binding effect but it is a purely advisory body whose advice the Railway Board

may or may not accept.[55] The Railway Tribunal provided for in the 1935 Act under S. 196 has a very restricted jurisdiction and can investigate only disputes between the Authority and federated states regarding failure to give traffic facilities, construction of new lines, etc. In other words in disputes between private parties and the Authority regarding undue preference, traffic facilities etc., the tribunal has no jurisdiction and the matter has to go only before the rates committee. In this connection these bodies can be usefully compared with the Interstate Commerce Commission of U.S.A. It consists of 11 members named by the President with the approval of the Senate. It was established in 1887 with 5 members. It has very wide powers *viz.*, fixing maximum and minimum rates, preventing discrimination etc. It has all the powers of the English Railway Tribunal and in addition the duty of applying the law in cases of complaints of discrimination. In fixing standard rates the English Railway Tribunal has to take into account only two things, one is securing to the railway company a net annual revenue and the other is that traffic on the railway is used as much as possible. By Act 33 of 1939 the federal legislature was empowered to fix maximum and minimum rates over government, private and state-owned railways. This power had been exercised by Government for a long time and the Act merely gave statutory recognition to this practice. Act 25 of 1942 has repealed Act 33 of 1939.

---

55. There is a proposal to have a Railway Tribunal in India. The proposed Tribunal, is to consist of three members, all of whom will be persons of judicial experience or qualified in law. They will be assisted by assessors, who will partly be men with industrial, commercial or trade experience and partly men with railway and financial experience. It is the intention that where a question of important principles or policy is involved in matters coming up before the Tribunal, investigation should be conducted by a full bench of the Tribunal, but where only routine matters are to be taken up, investigation should be left to a single judge, assisted by the assessors.

Complaints which the Tribunal would be authorised to investigate would be those relating to undue preference or to unreasonable rates and charges for merchandise traffic by goods trains. Provision was being made that no increase in the existing class rates or scheduled rates or terminal rates could be introduced by the Railway Administrations themselves. The question of rates could be determined only by the Tribunal, subject to the provision that the Tribunal could not examine those matters relating to increases, unless they had been initiated by the Central Government.

One important class of railway rates, which would be left outside the scope of the Tribunal, was that relating to passengers and coaching traffic, unless those matters were specifically referred to the Tribunal by the Central Government. There was no appeal against the decisions of the Tribunal, which would be final.

There would also be Claims Commissioners. The object was to remove the hardship at present experienced by passengers as a result of delays in the payment of compensation to those injured or to the dependents of those killed in accidents to passenger trains. The Claims Commissioners would adopt a summary procedure somewhat on the lines of the Small Cause Courts. They would also be empowered in adequate cases to make interim payments up to an amount not exceeding 50 per cent. of the amount of estimated compensation.

(3) **Railway Tribunal:** S. 196 deals with the composition of the Railway Tribunal. It consists of a President and two other persons. The President shall be a judge of the Federal Court appointed by the Governor-General in his discretion after consulting the Chief Justice of India. He holds office for a period of 5 years and is eligible for reappointment. The two other members are selected by the Governor-General in his discretion from a panel of 8 persons appointed by him in his discretion being persons with railway or business experience. If the President ceases to be a judge of the Federal Court he ceases to be the President of the tribunal. The tribunal may make orders for the payment of damages, production of documents, attendance of witnesses etc. An appeal lies to the Federal Court from the decision of the tribunal on a question of law but-from such an appeal, no further appeal lies. Rules regarding procedure, fees etc. are framed by the President with the approval of the Governor-General in his discretion. The remuneration to be paid to the ordinary members shall be determined by the Governor-General in his discretion and shall be payable out of the revenues of India. The expenses of the tribunal are non-votable. Ss. 193, 194 and 195, deal with the jurisdiction of the railway tribunal. Under S. 193 disputes between the authority and a federated state as to undue preference, failure to give facilities for the receiving, forwarding and delivering of traffic, including through traffic, go before the tribunal. Under S. 194 a federated state may complain to the tribunal that a direction given by the authority as to maximum or minimum rates or fares or as to station or service terminal charges is unreasonable. By S. 195 the authority or a federated state may complain that the proposed construction of a new line by either will result in unfair or uneconomic competition and the tribunal shall decide such disputes. Similar complaints regarding proposed alteration of a gauge of a railway might also be heard by the tribunal. Terminals as explained by the Director-General of Railways in 1887 are for services incidental to the business or duty of a carrier, such as working charges, repairs,renewals and insurance of station buildings, sidings, sheds, platforms, warehouses, cranes, turn tables, weighing machines, hydraulic, power fixing appliances, machinery etc., groundrent, loading and unloading, clerkage, weighing and checking of goods covering porterage and other labour of every description, shunting, gas and lighting rates, and taxes, risk of damage in loading and unloading, cartage, claims for compensation etc., inclusive of profit.

By S. 192 bills for regulating railway fares or rates cannot be introduced without the recommendation of the Governor-General. By S. 197 in cases where there is an existing contract between a railway company in India and the Secretary of State for India in Council, with an arbitration clause the dispute is deemed to have arisen between the company and the Secretary of State in-

stead of the company and the Secretary of State for India in Council. The arbitration takes place and the award if agreed to by the Secretary of State is binding on the federation and the federal railway authority. Any sums which the Secretary of State may become liable to pay are deemed to be a debt due to the federation from the authority. By S. 198 functions in relation to railways in nonfederated states may be entrusted to the authority by the Crown Representative. By S. 199 the Secretary of State for India in Council's powers in regard to the appointment of Directors and Deputy Directors of railway companies are transferred to the Governor-General in his discretion who has to exercise those powers after consulting the federal railway authority. Since Part 8 of the 1935 Act was not brought into force the Government of India Commencement and Transitory Provisions Order No. 2 of 1936 provided that S. 199 should come into force on 1st April 1937 but that until the Authority was established the Governor-General could make the appointments mentioned in that section without consulting the authority. S. 311 (2) distinguishes between federal railway, state railway and minor railway. A federal railway does not include state railway and minor railway. State railway is a railway owned and operated by a state otherwise than under a contract between the state and the Secretary of State for India in Council or the federal government etc. Minor railway is a railway wholly situated in one unit and not forming a continuous line of communication with a federal railway whether of the same gauge or not. The effect of entry 20 in the federal list and entry 18 in the provincial list is this. The federal legislature can legislate without any limit as regards federal railways. As regards state railways the federal legislature can legislate only as regards safety provisions, fixing of maximum and minimum rates, station and service terminal charges, interchange of traffic and the responsibility of the administration as carriers of goods and passengers. As regards minor railways the federal legislature can legislate only as regards the safety of passengers etc., carried by them and their responsibility as carriers of goods and passengers. The provincial legislature legislates as regards minor railways in regard to such matters as station or service terminals, maximum or minimum rates and fares etc.

CHAPTER VI

THE PROVINCIAL EXECUTIVE

(Sections 46–59)

(1) **General:** By S. 46 the following constitute Governors' provinces: Madras, Bombay, Bengal, Punjab, Bihar, C. P. and Berar, Assam, N.-W.F.P., Orissa and Sind. In the Act the word 'province' always means a Governor's province unless the context otherwise requires. S. 47 deals with Berar.[56] Berar was assigned to the British in 1853 by the Nizam for the purpose of paying the Hyderabad contingent and certain other expenses. By a treaty of 1860 the Berars were to be held in trust by the British for the payment of the troops of the Hyderabad contingent. In 1902 a fresh agreement was entered into by which the sovereignty of the Nizam over Berar was asserted and it was leased to the British Government in perpetuity in consideration of a fixed and perpetual rent of 25 lakhs of rupees payable by the British Government. The Governor-General legislated for Berar by Orders in Council under the Foreign Jurisdiction Act. After the Government of India Act 1919 Berar was administered with but not as part of the Central Provinces. The inhabitants elected a certain number of representatives and these were formally nominated to the Central Provinces legislature. Legislation provincial as well as central was applied through the machinery of the Foreign Jurisdiction

---

56. The question whether Berar now forms part of the Indian Union is one which does not admit of an easy answer. The Cabinet Mission Statement of 16-5-1946 placed Berar along with the Central Provinces and on the basis of population the legislators representing Berar in the Central Provinces Assembly were permitted to elect their representatives to the Constituent Assembly without a word of protest from the Nizam. The argument that because of the lapse of treaties under S. 7 of the Indian Independence Act 1947 the Nizam's dormant sovereignty over Berar revives is fallacious since even if the Nizam and Parliament so willed, it would be impossible to unsettle the previous subtractions from the Nizam's sovereignty on the principle of such well-known cases as *Campbell* v. *Hall* (1774) 1 Cowp. 204. S. 1 (2) of the Independence Act 1947 limits the territories of the Indian Union to all territories which were under the sovereignty of His Majesty before 15-8-1947 minus Pakistan. It is argued that since Berar was not under the sovereignty of His Majesty on 15-8-1947 it is not part of the Indian Union. This argument will lead to the *reductio ad absurdum* that the Constituent Assembly cannot amend the existing laws of Berar continued by S. 15 (3) of the Independence Act 1947. Neither can the Nizam amend them. The only two alternatives are that those laws cannot be changed at all or they can be changed only by the British Parliament both of which are untenable contentions. The truth is that legal quibbling apart the participation of Berar representatives in the Constituent Assembly deliberations can be interpreted as an accession of Berar to the Indian Union. See an article on "*The Case of Berar*" (1947) F.L.J. 132 by V. Sundaravyas.

Act. Berar members took the oath of allegiance to His Majesty although the Privy Council held in *Dattatreya* v. *Secretary of State* 57 I.A. 318 that Beraris were the Nizam's subjects and not British subjects. The Act of 1935 gets rid of this anomalous position. The administration of Berar will be as part of the Central Provinces. Berari members when taking the oath of allegiance to His Majesty will save their allegiance to H. E. H. the Nizam. Except for the purpose of the oath of allegiance Berari subjects of the Nizam shall be treated as British subjects for the purposes of the 1935 Act. Thus under S. 47 if an agreement is concluded between the Nizam and his Majesty there shall be one Governor's province of C.P. and Berar. Any reference in the Act or any other Act to British India shall be construed as a reference to British India and Berar. If the agreement is not concluded references in the 1935 Act to C. P. and Berar shall be construed as references to C. P. and His Majesty in Council may make such consequential modifications of the provisions of the 1935 Act relating to Central Provinces as he thinks proper. The Governor of C.P. is vested under S. 52 (2) with the special responsibility of seeing that a reasonable share of the revenues of the province is expended on or for the benefit of Berar.[56a]

(2) **Appointment of Governors Etc.:** S. 48 deals with the appointment of Governors. Under the the 1919 Act the Governor-General was consulted by His Majesty in regard to the appointment of the Governor but now because of provincial autonomy such a procedure would not be appropriate and so His Majesty now does not consult the Governor-General under the 1935 Act in regard to the appointment of provincial Governors. The India Provisional Constitution Order 1947 says that any person appointed after the establishment of the Dominion as Governor shall be appointed by the Governor-General. The salary of a Governor is not votable (S. 78 (3)), and cannot even be discussed—(S. 79 (1)). S. 306 deals with the Governor's protection against legal proceedings, while S. 304 deals with acting Governors and 305 with the secretarial staff of the Governor. The India Provisional Constitution Order 1947 has omitted all references in S. 306 to the Secretary of State and has substituted the Governor-General for His Majesty and sub-section (2) has been omitted. Formerly under S. 50 there were three spheres of responsibility, one in which the Governor acted on ministerial advice, the second that of discretion in which the Governor did not even consult his ministers and the third individual judgment in which sphere he consulted his ministers but could override them. The India Provisional Constitution Order 1947 has omitted all references in S. 50 to discretion and individual judgment and so now the Governor is in all matters guided by the advice of his ministers. S. 52 deals with the special responsibilities of the Governor. They are the prevention of

---

56a. See White Paper on Hyderabad, p. 43, lines 8, 9 & 10.

any grave menace to the peace or tranquillity of the province, the safeguarding of the legitimate interests of minorities, and of the Services, the administration of partially excluded areas, the protection of the rights of Indian states, executive action in regard to the provisions of the Act relating to commercial discrimination dealt with in Part 5 of the Act, and the execution of the orders of the Governor-General issued under Part 6 of the Act. Berar is a special responsibility of the Governor of C.P. and the proper administration of the Lloyd Barrage Scheme is a special responsibility of the Governor of Sind. In regard to these special responsibilities the Governor exercises his individual judgment, that is, he consults his ministers but he may override them if he so chooses. Ss. 51 (5), and 52 to 54 have been omitted by the India Provisional Constitution Order, 1947, as also ss. 56 to 58, 77, 83, 85, 89 and 90. This would be a convenient place to note the various sections of the Act dealing with the individual judgment powers of the Governor. They are: S. 55 (4) Appointment of Advocate-General, (omitted by I.P.C.O.) S. 56 Provision as to police rules (omitted by I.P.C.O.), S. 88 Promulgating ordinances. S. 54 provides that where the Governor exercises his individual judgment or acts in his discretion he shall be under the control of and obey the directions of the Governor-General acting in his discretion.

(3) **Advocate General:** S. 55 deals with the Advocate-General of the province. This office corresponds to that of the Attorney-General in England. The Attorney-General in England represents the Crown in courts of justice and acts as legal adviser to the Government departments on more important matters. The Attorney-General takes part in many judicial or quasijudicial proceedings relating to the public interest, such as proceedings relating to the administration of charities and incometax. The appointments (of the A.G. and the S.G.) are political and are conferred on successful barristers who are supporters of the party in power. The Attorney-General is sometimes a member of the Cabinet but in view of his duties in connection with prosecutions it is generally regarded as preferable that he should remain outside the Cabinet as the Government's chief legal adviser. The Attorney-General draws substantial sums in fees for Crown litigation though private practice is prohibited. The duties imposed upon the Attorney-General by statute can in the event of absence or illness or with special authority be carried out by the Solicitor-General under the Law Officers Act, 1944. The Attorney-General may at any time stop a criminal prosecution by the entry of a *nolle prosequi*. This power is used to stop vexatious prosecutions. Its exercise is open to criticism by the legislature; any abuse is prevented by the ordinary principle of ministerial responsibility. Under the 1919 Act there were Advocates-General only for the three Presidencies of Madras, Bombay and Bengal. Their duties were to advise the Government on legal matters, to represent the Crown in original causes before

the High Court, to enter *nolle prosequi*, grant review of the criminal cases tried by the original side of the High Court in sessions, and to protect public rights in such matters as public charities and public nuisances. The Advocates-General of the three presidencies were appointed by His Majesty by Warrant under the Royal Sign Manual. Now there are Advocates-General for all provinces and they are appointed and dismissed and their remuneration is determined by the Governor exercising his individual judgment. The Advocate-General should be a person qualified to be appointed as a High Court Judge and it shall be the duty of the Advocate-General to give advice to the provincial Government upon such legal matters and perform such other duties of a legal character as may from time to time be referred or assigned to him by the Governor. In assigning work to the Advocate-General the Governor shall be guided by the advice of his ministers.

(4) **Special Provisions :** S. 56 deals with the amendment of police rules which can be done only by the Governor in the exercise of his individual judgment. Law and Order have no doubt been transferred to ministers under the 1935 Act but this transfer has been hedged in by a number of restrictions to ensure that it is administered without the suspicion of political influence or pressure being brought to bear upon it of which this section and the two following sections are illustrations. The 1935 Act has provided a number of safeguards to ensure that Law and Order are withdrawn from the arena of party politics and interference by the members of the party in power, in the legislature. They are : (i) The special responsibility of the Governor to prevent any grave menace to the peace or tranquillity of the province S. 52 (1) (*a*); (ii) Powers to promulgate Governor's Acts and ordinances ss. 88 to 90; (iii) Protection of the legitimate interests of the Services including the police services. S. 52 (1) (*c*) ; (iv) Requirement of the previous sanction of the Governor for police Acts under S. 108 (2) (omitted by the I.P.C.O.) ; (v) The provisions of ss. 56 to 58. Under S. 57 if it appears to the Governor that the peace or tranquillity of the province are endangered by the operations of persons committing acts of violence intended to overthrow Government, he may give a direction that to such extent as is specified therein his functions shall be exercised in his discretion. He may depute an official to speak and participate in the proceedings of the legislature but such an official cannot vote. This section contemplates a situation not so serious as that under S. 93. Under s. 57 the emergency is comparatively less serious and the Governor takes over one or two departments. Under S. 93 the emergency is graver and the Governor takes over all the powers of all provincial authorities except those of the High Court. Under S. 58 the Governor can make rules for regulating the disclosure of sources of information relating to crimes of violence intended to overthrow Government. In the case of these terrorist crimes sources of information

would dry up once their identity became known or were liable to become known outside the particular circle of police officers concerned. Even in England in secret service cases the names of the informants are not disclosed to the Ministers and the J.P.C. Report was of the view that this English practice should be incorporated in the 1935 Act. Under rules made by the Governor of Madras under this section no police officer can disclose such information to anybody except the following: Chief Secretary to Government, Secretary to Government Home Department, District Magistrates, Public Prosecutors etc. S. 59 deals with the authentication of orders made by the Governor. Such authentication has to be made in Madras under rules made by the Governor, by the Secretary, Deputy Secretary, or Under Secretary of the department concerned. Copies of orders can be authenticated by Superintendents. Where the order is not properly authenticated its issue has to be proved specifically.[57]

---

57. S. 42.—The following notification was issued on 23-1-1948 in the Gazette of India Extraordinary under S. 42. " The word " Indian Commissioned Officer " occurring in the Indian Army Act 1911 includes an officer of Indian nationality holding a commission in His Majesty's land forces."

S. 49.—The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-1947) has in S. 49 (1) substituted " Dominion Legislature " for " federal legislature".

Other Amendments in Ss. 48–59 :

The India Provisional Constitution Order 1947 has omitted S. 51 (5) and in S. 59 (3) has omitted all words after " said business " as also S. 59 (4) and (5). The use of the expression " Government of Bombay " instead of "Governor of Bombay " in a notification does not render it invalid—*Nurie* v. *Dange* 50 Bom. L. R. 471. See, however, *Dange* v. *Divatia* 49 Bom. L. R. 468 holding that the provisions of S. 59 are mandatory and not merely directory.

CHAPTER VII

THE PROVINCIAL LEGISLATURE

(Ss. 60–87 and 88–90)

(1) The Provincial Legislatures : The following provinces have two chambers: Madras, Bombay, Bengal, U.P., Bihar and Assam. Other provinces have only one chamber. The Round Table Conference recommended two chambers only for Bengal, Bihar, and U.P. The J.P.C. Report added Madras and Bombay to the list. In the committee stage of the 1935 Bill Assam was added. In the case of the Punjab that province had even as early as 1922 rejected a motion for a second chamber without a division. A second chamber is intended to elicit the sober second thought of the people as contrasted with the impulsive first thought of the lower house. In the provincial upper houses no special interests are given any protection. The election is on the basis of territorial constituencies divided communally, but in the case of Bengal 27 members, and in the case of Bihar 12 members, of the upper house are indirectly elected by the lower houses of these provinces.[57a] Under S. 308 (omitted by the I.P.C.O.) after 1st April 1947 provincial legislatures can pass resolutions recommending amendment of the provisions of the Act relating to the size, composition, number of chambers, etc., of the provincial legislatures for submission by the Governor to His Majesty. S. 70 deals with the penalty to be paid by a person who sits or votes unauthorisedly. Under the corresponding provision in the South African Constitution Act, 1909 the penalty is to be paid only if a person knowingly or having reasonable grounds for knowing that he is disqualified,sits or votes. Where a person's election is questioned, if he sits or votes in the *bona fide* belief that he is entitled to do so, he is not liable to pay the penalty in S. Africa, but in India he may be liable to pay the penalty because the terms of the Indian Act are wider. S. 75 deals with the reservation of provincial bills. Under the 1919 Act the Governor had to reserve the following classes of bills for the consideration of the Governor-General ; bills affecting religious rites, universities or the land revenue of the province. Under the present Act and the Instrument of Instructions the Governor is

---

57a. The India Provisional Constitution (Second Amendment) Order, 1947, (Gazette of India Extraordinary, 6-10-1947) has made the following addition at the end of para. 19 of 5th Schedule :—

" For the purposes of this paragraph a person shall be deemed to be a native of India or Pakistan or of an Indian state if, and only if, he is a person domiciled in India, Pakistan, or the Indian state, and born of parents habitually resident in the territories comprised therein and not established there for temporary purposes only."

given a discretion to reserve such bills as he thinks fit but the following bills have to be reserved: Bills repealing or amending Acts of Parliament applicable to India, bills derogating from the powers of High Courts, bills which offend the provisions of the Act relating to compulsory acquisition of land or the prevention of commercial discrimination or which alter the character of the Permanent Settlement. In Canada, as here, provincial bills are reserved for the consideration of the Governor-General and not for the consideration of His Majesty direct. In Australia, on the other hand, State bills are reserved for the consideration of His Majesty directly. Once a bill has been assented to by a Governor, the Governor-General cannot disallow it. On the other hand, in Canada provincial bills have sometimes been disallowed by the Governor-General on the ground that they are confiscatory of private rights without payment of compensation etc. S. 83 provides that a grant not less than the average of the grants made during the ten years preceding 1933 shall be made annually for Anglo-Indian or European education unless the Assembly by a majority of three-fourths of the members of the Assembly decides otherwise. Such a majority can also abrogate the provisions of S. 83.[58]

(2) **Legislative Powers of Governors:** This topic is dealt with in Ss. 88 to 90. Ss. 88 and 89 deal with the power of the Governor

---

58. **Other Amendments in Ss. 60–87.**

In S. 60 (1) for "Bengal, U. P., Bihar and Assam" "U.P. and Bihar" has been substituted by the India Provisional Constitution Order 1947. In S. 67 for the words from "that one" to the end "the form set out in the 4th Schedule to the Act" has been substituted. S. 68 (2) has been omitted. In S. 69 (1) (*e*) "whether before or.....Act" has been omitted and for "by a Court in.....federated State" the following has been substituted "before the establishment of the Dominion by a court in British India or on or after that date by a court in a Governor's or Chief Commissioner's province or an acceding State." In S. 71 (2) for the words from "commencement of this Part" to "Province" substitute "establishment of the dominion enjoyed by members of that chamber or in the case of W. Bengal and E. Punjab by members of the Provincial legislative assemblies of Bengal and Punjab respectively." In S. 72 all words after "legislature" have been omitted and a new proviso grants to members of the legislative assemblies of W. Bengal and E. Punjab the same salaries to which the members of the Bengal and Punjab assemblies were entitled before 15-8-47. In S. 74 (2) "or affects.. ..... responsibilities" has been omitted as also S. 76 (2). In S. 78 (2) all words after "from other expenditure" have been omitted. In S. 78 (3) (*a*) for "required to be made by order in council" "made by or under the 3rd Schedule" has been substituted. S. 78 (4) has been omitted. S. 80 (1) proviso has been omitted. An addition to S. 80 (3) empowers the Governors of W. Bengal and E. Punjab to authorise or ratify expenditure from the revenues of these provinces during the period 15-8-1947 to 31-3-1948. In S. 84 (2) the proviso has been omitted. In S. 84 (2) the last sentence has been omitted. A substituted S. 84 (3) provides for the continuation of the rules of the Bengal and Punjab assemblies in their application to the W. Bengal and E. Punjab assemblies with modifications made by the Speaker. S.86 (2) has been omitted.

See p. 62.

apart from the legislature to enact temporary legislation, that is ordinances and S. 90 deals with his power to enact permanent legislation. Under S. 88 if at any time the provincial legislature is not in session and the Governor thinks that it is necessary to take immediate action, he may promulgate an ordinance. The ordinance shall be laid before the Provincial legislature and shall cease to operate at the expiration of 6 weeks from the reassembly of the legislature or even before if resolutions disapproving of it are passed by both the houses of the provincial legislature. The Governor exercises the powers conferred by this section on the advice of his ministers. If a similar bill would have required the previous sanction of the Governor or of the Governor-General for its introduction in the legislature the Governor shall exercise his individual judgment in regard to such ordinance and if a similar bill would have to be reserved by the Governor for the consideration of the Governor-General the Governor should promulgate the ordinance only under the instructions of the Governor-General. This is the proviso to S. 88 (1). The India and Burma Miscellaneous Amendments Act, 1940 (3 & 4 Geo. VI, C. 5), S. 4 has made the following changes in sub-clauses (*a*) and (*b*) of the proviso to S. 88 (1). In both sub-clauses (*a*) and (*b*) the following para has been added ' Provided if an Act of the provincial legislature containing the same provisions would have been invalid unless having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure it has received the assent of the Governor-General or of His Majesty.' This para was added at the end of both clauses (*a*) and (*b*). By the same 1940 Act a new proviso has been added to S. 88 (3). For the purposes of repugnancy between federal and provincial laws provided for in S. 107 an ordinance promulgated under S. 88 under instructions from the Governor-General shall be deemed to be an Act of the provincial legislature which has been reserved for the consideration of the Governor-General and assented to by him.[58a] S. 89 deals with an ordinance made by the Governor in his discretion. If the Governor thinks that he should take immediate action for the purpose of satisfactorily discharging his functions in regard to which he has to exercise his individual judgment or to act in his discretion he may promulgate an ordinance under this section. An ordinance under this section operates for 6 months

---

58 (*a*). In *Emperor* v. *Sibnath Banerjea* (1943) 2 M.L.J. 468 (F C.) the interesting point was mooted as to whether an ordinance could amend an Act of the legislature. In that case an ordinance passed by the Governor-General amended the Defence of India Act 1939 so as to validate Rule 26 of the Defence of India Rules and get over the difficulty created by the decision of the Federal Court in *Keshav Talpade* v. *Emperor* (1943) 2 M.L.J. 290 (F.C.). The Ordinance also validated sentences passed under the old Rule 26 before amendment. The Federal Court without pronouncing any opinion on the first point held that the later provisions were perfectly valid and severable from the rest of the provisions.

and may be renewed for a further period of 6 months. If it is an ordinance renewing a previous ordinance it has to be communicated to the Secretary of State for India and laid before both Houses of Parliament. By the 1940 amendment after the words " federal legislature " in S. 89 (4) proviso the following words were added " or an existing Indian law with respect to a matter enumerated in the concurrent list." These words were also added by the same Act in S. 90 (3) proviso. S. 90 deals with cases where the Governor may enact permanent legislation. If a Governor thinks that for the purpose of satisfactorily discharging his functions in so far as he is required to act in his discretion or to exercise his individual judgment provision should be made by legislation he may at once enact a Governor's Act or send a message to the Provincial Legislature with a draft bill attached. In the latter case if within one month the provincial legislature makes any suggestions in regard to the bill the Governor shall consider such suggestions. Governors' Acts have to be communicated to the Secretary of State for India and laid before both Houses of Parliament. The functions of the Governor under this section are exercised by him in his discretion and under instructions from the Governor-General. The I.P.C.O. has substituted the following for the proviso to S. 88 (1). " Provided that the Governor shall not without instructions from the Governor-General promulgate any such ordinance if an Act of the provincial legislature containing the same provisions would under this Act have been invalid unless having been reserved for the consideration of the Governor-General it had received the assent of the Governor-General." The differences between these sections may be noted : the legislation under ss. 88 and 89 is temporary, that under S. 90 is permanent ; the legislation under S. 88 is made on ministerial advice ; that under the other two sections is not made on ministerial advice. The legislature is associated in some manner with the legislation under ss. 88 and 90 while under S. 89 the legislature has no say in regard to an ordinance passed under that section.[59]

---

59. **Amendments in Ss. 88-90:**

A substituted proviso to S. 88 (1) has laid down that where it would have been necessary to reserve an Act containing the same provisions for the consideration of the Governor-General, the Governor cannot promulgate the ordinance without instructions from the Governor-General. (I.P.C.O.). See p. 62.

CHAPTER VIII

CHIEF COMMISSIONERS' PROVINCES, EXCLUDED AND PARTIALLY EXCLUDED AREAS, ADEN, ETC.

(Ss. 91–98. 173 (5) & 288)

(1) **Excluded Areas Etc :** Under S. 91 His Majesty in Council may by Order determine what areas should be excluded areas and what areas should be partially excluded areas. The Secretary of State has to lay before Parliament the draft of any Order relating to this subject within 6 months after the passing of the 1935 Act. His Majesty may by Order in Council make an excluded area a partially excluded area, or a partially excluded area an ordinary area.[60] By S. 92 the executive authority of the province extends to excluded and partially excluded areas but federal and provincial laws do not apply to such areas unless they are applied to such areas by the Governor by notification, and the Governor may direct that these laws shall apply with modifications. The Governor is also empowered to make regulations for the peace and good government of these areas and these regulations may repeal or amend provincial and federal laws. Such regulations have no effect until assented to by the Governor-General in his discretion and they may also be disallowed by His Majesty. In regard to excluded areas the Governor exercises his discretion. The I.P.C.O. has substituted the following for S. 91. "In this Act the expressions 'excluded area' and 'partially excluded area' mean respectively such areas as were excluded or partially excluded areas immediately before the establishment of the Dominion." In S. 92 (2) the power of His Majesty to disallow regulations has been taken away by the I.P.C.O. which has also omitted sub-S. (3) relating to the Governor exercising his discretion in regard to these excluded areas.

---

60. S. 91.—The India Provisional Constitution (Third Amendment) Order 1948 (Gazette of India Extraordinary 31-3-1948) has added the following new proviso to S. 91.—" Provided that the Governor-General may at any time by order direct that the whole or any specified part of an excluded area shall become or become part of a partially excluded area ; (*b*) direct that the whole or any specified part of a partially excluded area shall cease to be a partially excluded area or a part of such area ; (*c*) alter but only by way of rectification of boundaries of any excluded or partially excluded area ; (*d*) on any alteration of the boundaries of a province or the creation of a new province declare any territory not previously included in any province to be or to form part of any excluded area or partially excluded area and any such order may contain such incidental and consequential provisions as appear to the Governor-General to be necessary and proper ".

In the earliest period the Governor-General made laws for these backward and uncivilised tracts by Orders in Council corresponding to Orders in Council made by the Crown. Doubts as to this method of legislation by executive action were removed by the Indian Councils Act 1861 which validated regulations already made but took away the power of legislation in regard to the future. Under the Government of India Act 1870 the lawmaking power in regard to these areas was restored to the Governor-General in Council though in a different form. The Secretary of State applied the Act to some area and the Governor proposed the draft of any legislation which he considered necessary for that area and on the draft being approved by the Governor-General in Council it became law as if it had been passed by the Legislative Council. Under the Scheduled Districts Act 1874, local Governments could declare what enactments were in force in these backward tracts known as scheduled districts and the local Governments were also given power to extend enactments in force in British India to these scheduled districts with modifications. Under the 1919 Act first an area was notified to be a backward tract with the sanction of the Secretary of State and then the Governor-General applied Acts of the Indian Legislature to it by notification with modifications if he so thought fit. The Governor-General had also power to make regulations for these areas by executive action. In the case of such areas the Governor-General could also direct that the Government of India Act, 1919 should apply only with such modifications as might be prescribed. The Laccadive Islands and Minicoy Islands, Chittagong hill tracts and Sipti were so declared and expenditure in connection with these areas was nonvotable. Questions could not be asked in the legislature in regard to these areas and even in regard to transferred subjects these areas were not under the control of ministers. In the case of the Ganjam and Godavari agencies the Governor merely retained the power to apply Acts of the legislature with modifications. The Government of India Bill of 1935 accepted the distinction between fully excluded and partially excluded areas drawn first by the White Paper and drew up a list of these areas but the list was too meagre and it was considered advisable to leave the specification of these areas to be done by Orders in Council. Under the Excluded and Partially Excluded Areas Order 1936 the Laccadive and the Amindivi Islands in Madras, Chittagong hill tracts, Sipti in Punjab and Naga hills in Assam are fully excluded areas. In Madras the Godavari and Vizagapatam Agencies are partially excluded areas. In regard to fully excluded areas the Governor acts in his discretion. (S. 92). In regard to partially excluded areas he exercises his individual judgment (S. 52). Expenditure in connection with fully excluded areas is nonvotable (S. 78) and questions in regard to such areas cannot be asked, (S. 84) without the consent of the Governor. In regard to partially excluded areas questions can

be freely asked without the consent of the Governor and the expenditure in connection with partially excluded areas is subject to the vote of the legislature but if any grant in relation to them is rejected or reduced the Governor can restore the amount reduced or the whole grant as the case may be. The Governor acting under S. 91 of the 1935 Act has full plenary powers of legislation with respect to excluded areas not limited to any period of time or to any particular entry in the 7th Schedule to the 1935 Act. S. 92 vests legislative power in the Governor and is not only a delegation of administrative authority. Regulations made under S. 92 can override federal and provincial laws in force in that area.—*Chatturam* v. *Commissioner of Income-tax, Bihar* (1947) 2 M.L.J. 432 (F.C.). See also *Chatturam* v. *Commissioner of Income-tax, Bihar and Orissa* A.I.R. (1947) Pat. 76 (S.B.).[60a]

(2) **Break-down of Constitutional Machinery:** If the Governor at any time thinks that the Government of the province cannot be carried on in accordance with the provisions of the 1935 Act he may issue a proclamation under S. 93 and assume to himself all or any of the powers vested in any provincial body or authority provided that the Governor cannot assume to himself any of the powers vested in the High Court or suspend the operation of the provisions of the 1935 Act relating to High Courts. The Governor may however suspend the operation of other parts of the Act not relating to High Courts. A proclamation has to be communicated to the Secretary of State and laid before both Houses of Parliament and ceases to operate at the expiration of 6 months. Provided that if both Houses of Parliament pass resolutions approving the continuance of the proclamation it can be continued for a further period of 12 months but never in any case beyond three years. See now the provisions of the India and Burma (Temporary and Miscellaneous Provisions) Act 1942 removing the maximum period of 3 years as the life of such proclamation. Laws made by the Governor under this section have effect for 2 years from the date on which the proclamation expires unless sooner repealed by the appropriate legislature. The Governor exercises his functions under this section in his discretion and with the concurrence of the Governor-General. S. 93 has been omitted by the I.P.C.O. In *Hirji Laxmidas* v. *Fernandez* (1945) F.L.J. 11 (H.C.) the Bombay Rents Hotel Rates and Lodging House Rates Control Act 1944 which was passed by the Bombay Governor who had assumed legislative powers under S. 93 was attacked on the ground that because the Act made the Collector's and Controller's decision final and excluded the jurisdiction of the Civil Courts it offended the proviso to S. 93 which prohibits the Governor from assuming to himself the powers of the High Court or suspending the operation

---

60a. See *Shyam Lal* v. *King* A.I.R. (1948) Pat. " 355 as to meaning of " existing Indian law" in S. 92 (2).

of the provisions of the Act relating to the High Court. The Bombay High Court held that nothing of that sort was done and that the Act was perfectly valid because it was an alteration of a law by or under the assumed legislative powers which was within the competence of the provincial legislature.

(3) **Delhi :** Delhi was made a Chief Commissioner's province in 1912. The Governor-General could extend to Delhi any Act in force in any other part of British India. Delhi was subject to the jurisdiction of the Lahore High Court. Under the 1919 Act Delhi elected one member of the Central Legislature. Under the 1935 Act it elected one member for the Federal Council of State and two members for the Federal Assembly, one for the general seat and the other for the Muslim seat.

(4) **Ajmer-Merwara :** This is in Indian State territory and the Agent to the Governor-General, Rajputana States, is the Chief Commissioner. Under the 1919 Act it elected one member and now it elects two members, one to each House of the Federal Legislature from the general constituency.

(5) **Panth Piploda :** This is a small tract 19 square miles in area with a population of 4,000 and an annual revenue of Rs. 15,000. It is administered by the Political Agent at Malwa and belongs to a Chief of the Dakshina Brahmin community who granted it to the British in consideration of a cash allowance.

(6) **British Baluchistan :** This interlocks with tribal areas and the system of tribal *jirgas* prevailing there and the intimate connection of these tribal areas with the problem of Indian defence have affected the decision to withdraw these areas from the sphere of action of federal ministers. (This is now part of the new Dominion of Pakistan).

(7) **The Andaman and Nicobar Islands :** These formed a penal settlement till 1921 when the settlement was abolished. But later it was revived to accommodate certain terrorist prisoners whose incarceration in India was not deemed safe. The Scheduled Districts Act 1874 and the Government of India Act 1870, S. 1, have been applied to the Andamans.

(8) **Coorg :** This was annexed in 1834. From 1919 it is having a legislature of 20 members (15 elected and 5 nominated) with limited powers, its resolutions being only recommendatory. One member to the Federal Lower House is elected by the Coorg Legislature for the general seat. One member for the general seat to the Federal Upper House is elected by territorial constituencies. Till 1st April 1948 the District and Sessions Judge, Chittoor was performing the duties of Judicial Commissioner of Coorg,

under the Coorg Courts Regulation 1901. From that date this Regulation was replaced by the Madras High Court (Extension of Jurisdiction to Coorg) Order, 1948.

(9) **Aden :** Till 1935 Aden was administered as a part of British India through a Chief Commissioner and an annual contribution was made from Indian revenues towards the administration of the Protectorate. The decision to transfer Aden to the Home Government was influenced by various considerations for example the feeling of the Arabs who formed the majority of the population against remaining as part of India, geographical remoteness of Aden from India, the impossibility of divorcing the civil administration of Aden from its political and military administration etc. The safeguards provided for India are :—India is relieved of her annual contribution, appeals in civil cases from Aden lie to the Bombay High Court, Aden is a free port, no additional taxation will be imposed and the administration will be kept up at its present standard. S. 288 of the 1935 Act authorised His Majesty to make such provision as he deemed for the Government of Aden. Property which was formerly vested in His Majesty for purposes of the Government of India vest in His Majesty for the purposes of the Government of Aden by virtue of S. 288 (5). S. 16 (1) of the Indian Independence Act 1947 (10 and 11 Geo. VI. C. 30) lays down that S. 288 (2) to (4) shall cease to apply to Aden and the British Settlements Acts 1887 and 1945 shall apply to Aden as if it were a British Settlement. By S. 16 (2) existing Orders in Council are continued but they may be repealed under the powers of the British Settlements Acts 1887 and 1945. By S. 16 (3) the provisions of the said Orders relating to appeals from Aden Courts to Courts in either of the two new dominions of India and Pakistan shall apply to Aden and the dominion in question unless other provision to the contrary is made under the powers of the British Settlements Acts 1887 and 1945 or by a dominion law. S. 173 of the 1935 Act does not apply to property situated in Aden or to arrears of taxes in Aden.

(10) **General :** The Chief Commissioner is appointed by the Governor-General in his discretion under S. 94 (3). S. 95 (1) lays down that in controlling the administration of British Baluchistan the Governor-General acts in his discretion. By S. 95 (2) federal laws do not apply to British Baluchistan unless they are applied by the Governor-General in his discretion by public notification with such modifications as he thinks fit. S. 95 (3) says that the Governor-General in his discretion may also make laws for the peace, order and good government of British Baluchistan which may repeal federal laws or existing Indian laws applicable to the province. S. 96 applies the provisions of S. 95 (3) to the Andamans also. S. 97 lays down that until other provision is made by His Majesty in Council arrangements in respect of the revenues collected in Coorg and their expenditure and in respect of the Coorg legisla

ture continue unchanged. By S. 98 the provisions of Ss. 56, 57, and 58 have been applied to Chief Commissioners' provinces, with 'Governor-General' substituted for 'Governor' and the 'Federal Legislature' substituted for the 'Provincial Legislature'.

(11) Amendments in Ss. 91 to 98 : 173 and 288 : Ss. 95 and 98 have been omitted by the India Provisional Constitution Order 1947. For S. 96 a new section has been substituted which lays down that the Governor-General may make regulations for the peace and good government of the Andamans which may repeal or amend dominion laws or existing laws and such regulations have the same force as dominion laws. In S. 94 (1) 'British Baluchistan' has been omitted, as also sub-section (2). In S. 97 for 'His Majesty in Council' the following has been substituted 'Or in accordance with a law, made by the Constituent Assembly under sub-section 1 of section 8 of the Indian Independence Act 1947.' Ss. 173 and 288 have been omitted.

CHAPTER IX

PROVINCIAL JUDICIARY

(Sections 219-31)

(1) General: Sections 219 to 231 deal with High Courts. The High Courts of Madras, Bombay, Calcutta, Allahabad, Lahore, Patna, the Chief Court of Oudh, the Judicial Commissioners' Courts in C.P., Sind and N.-W.F.P., are deemed to be High Courts for the purposes of the Act as also any other Court constituted as a High Court under Part 9, Chapter 2 or any other Court declared as a High Court by His Majesty in Council. The proviso is intended to meet the case of the C.P. whose Judicial Commissioner's Court was converted into a High Court before the Act came into force in January 1936. By an Amendment of 1940 to S. 219 (1) the newly established Chief Courts of Sind and N.-W.F.P. were added to the list of High Courts mentioned in that section. The I.P.C.O. has omitted references in the section to Lahore and has included a reference to East Punjab. For 'His Majesty in Council' 'the appropriate Legislature' has been substituted. 'India' has been substituted for 'British India' and by a new sub-S. 3 added to the section 'India' has been defined to be the Governors' provinces and Chief Commissioners' provinces excluding acceding states.[61]

---

61. S. 219.—The India Provisional Constitution (Amendment) Order 1948 (Gazette of India Extraordinary 5-2-48) has in S. 219 (1) proviso substituted the words " order of the Governor-General " for the words " His Majesty by letters patent."

S. 220.—The India Provisional Constitution (Amendment) Order 1948 (Gazette of India Extraordinary 5-2-48) has in S. 220 (2) proviso, para. (*b*) substituted the words " If the Federal Court on reference being made to it reports " for the words " if the Judicial Committee of the Privy Council on reference being made to them report." The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 220 (3) (*c*) omitted the word " British".

S. 225.—The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 225 substituted the words " dominion legislature " for the words " federal legislature".

S. 226.—The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 226 (2) substituted the words " in the dominion legislature or a chamber of the provincial legislature " for the words " in a chamber of the provincial legislature".

S. 229.—The India Provisional Constitution (Amendment) Order 1948 (Gazette of India Extraordinary 5-2-48) has in S. 229 substituted for the words " His Majesty " and " Letters Patent " the words " Governor-General " and " Order " respectively.

S. 229.—The United Provinces (High Courts Amalgamation) Order 1948 (Gazette of India Extraordinary 19-7-48) amalgamating the High Court of Allahabad and the Oudh Chief Court into the High Court of Judicature of

(2) Constitution of Court, Qualification of Judges Etc.: S. 220 lays down that every High Court shall be a court of record and consist of a Chief Justice and such number of judges as do not exceed such maximum as may be fixed for each Court by His Majesty by Order in Council. The High Court Judges Order 1937 has fixed the following as the maximum number of judges for the various High Courts: Calcutta 19, Madras 15, Bombay 13, Allahabad 12, Lahore 15, Patna 11, Nagpur 11, Oudh 5, N.-W.F.P. 2, Sind 3. High Court judges may be removed from office in the same manner as Federal Court judges are removed from office. The qualifications for a High Court judge are 10 years' standing as a barrister, advocate etc., service in the I.C.S. for at least 10 years including service for at least 3 years as District Judge, service as Sub-Judge or Small Cause Court Judge for at least 5 years. Persons who are not barristers etc., are not qualified for appointment as Chief Justice unless they have served at least for 3 years as High Court judge. Under the 1919 Act one-third of the judges were to be barristers and one-third I.C.S. men and the Chief Justice was to be recruited only from among the barristers. The disqualification imposed on I.C.S. men in the matter of their being appointed to the post of Chief Justice has been abrogated partially by the 1935 Act. The India (Miscellaneous Provisions) Act, 1944 laid down that a High Court judge should be deemed to have vacated his office when he was made a judge of the Federal Court or of another High Court. The I.P.C.O. has substituted 'Governor-General' for 'His Majesty in Council' in sub-S. (1) as also in sub-S. (2). In sub-S. (3) the proviso which says that an I.C.S. man cannot be appointed as Chief Justice unless he has 3 years' service as High Court judge has been omitted and in computing periods of service as a judge of a High Court in India or in other judicial office,

---

Allahabad, and the Orissa High Court Order 1948 (Gazette of India Extraordinary, 30-4-1948) have been made by the Governor-General under S. 229 as also the Assam High Court Order 1948 (Gazette of India Extraordinary, 1-3-48).

Other Amendments in Ss. 219–231 :

In S. 220 (2) for " His Majesty .....Manual " " the Governor-General " has been substituted ; in para. (*b*) of the proviso " by His Majesty " has been omitted where those words occur for the second time and in para (*c*) " by His Majesty " has been omitted by the India Provisional Constitution Order 1947. In S. 222 (1) for " appointed by His Majesty " "permanently appointed" has been substituted. A similar substitution has been made in S. 222 (2). In S. 222 (1) for "for the purpose" as "Acting Chief Justice" has been substituted. In S. 223 after " any other Act " "to the provisions of any order made under the Indian Independence Act 1947 " has been inserted and for " commencement of Part 3 of this Act " " establishment of the dominion " has been substituted. S. 228 (2) has been omitted. In S. 230 (1) for " His Majesty in Council" "Governor-General" has been substituted, for " extend " " by order extend " has been substituted and for " British India " " India ". In S. 230 (2) for " commencement of Part III of this Act " " establishment of the dominion " has been substituted. In S. 231 (2) the words " and expenses " have been omitted.

service before the establishment of the Dominion as a High Court judge in British India or service in any judicial office in India shall be included. *Quaere:* Is not reference to period of service as High Court Judge a slip? Under S. 221 the salaries, allowances, pensions etc. of High Court judges were formerly fixed by Order in Council and now under the I.P.C.O. they are fixed by the Governor-General. S. 222 gives to the Governor-General power to appoint acting Chief Justices, acting judges and temporary additional judges.

(3) **Jurisdiction of High Court:** S. 223 lays down that the jurisdiction of the High Courts shall be the same as it was before the commencement of Part III of the Act subject to the provisions of the 1935 Act, Orders in Council made under it and, Acts of the appropriate legislature. The I.P.C.O. has enacted that the jurisdiction of the High Courts shall be the same as it was before the establishment of the Dominion subject to the provisions of the 1935 Act etc., and also subject to the provisions of any Order made under the Independence Act 1947. The High Courts possess jurisdiction in a variety of matters such as civil, criminal, probate, divorce, admiralty, insolvency, prize, etc. The three presidency High Courts exercise ordinary original civil jurisdiction within the municipal limits of the three presidency towns of Calcutta, Bombay and Madras. Where the suit is for immovable property and it lies partly within and partly without the said limits or where part of the cause of action has arisen beyond the said limits, leave of Court must be obtained in order to institute the suit. If the whole of the cause of action has arisen beyond the said limits the suit cannot be instituted unless the defendant lives within those limits. The extraordinary original civil jurisdiction of the High Court consists in its power to remove any suit from any Court subject to its superintendence and to determine it itself. The appellate jurisdiction of the High Court is exercised in respect of the decisions of the lower Courts and of judges of the original side of the High Court. The present High Courts possess all the powers which were possessed by their predecessors, the Supreme Courts, and these in turn possessed all the powers possessed by the English High Court of Justice. This is so in regard to the three presidency High Courts of Madras, Bombay and Calcutta. Some knowledge of the powers of the English High Court is therefore still necessary to define the powers of our High Courts. This defining of the powers of the present High Courts by reference to the powers of the former Supreme Courts has led to complications especially in the matter of the power of the High Court to issue prerogative writs like those of *certiorari*, *mandamus* and *habeas corpus*.

(*a*) *Certiorari*: *Certiorari* issues to remove a suit from an inferior Court into the King's Bench Division of the High Court. It may

be used before a trial is completed to prevent an excess of jurisdiction. It is also invoked after trial to quash an order which has been made without jurisdiction or in defiance of the rules of natural justice. The power of obtaining *certiorari* is not limited to judicial acts or orders in a strict sense, that is to say acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or give a decision which determine the rights of property of the affected parties. In *King* v. *Hendon, R.D.C. ex parte Chorley* (1933) 2 K.B. 696 *certiorari* was granted at the instance of an adjacent owner to quash a decision of a district council giving permission for development of land in an area where under a town-planning scheme such permission might give rise to a claim for compensation payable by the ratepayers. It was shown that a member of the council interested in the use of the land had voted on the resolution. The rule lay against a County Council which had given an applicant permission under its statutory powers as a licensing authority to do that which he was expressly forbidden by statute to do *e.g.*, to open a cinema on a Sunday—*King* v. *L.C.C. ex parte Entertainments Protection Association Ltd.* (1931) 2 K.B. 215. In *General Medical Council* v. *Spackman* (1943) A.C. 627 the House of Lords quashed a decision of the General Medical Council removing a doctor's name from the medical register. The council which was under a statutory obligation to hold a statutory enquiry had refused to hear fresh evidence to dispute a finding by the Divorce Division of the High Court that the doctor had committed adultery with a patient. Where the proceedings are regular upon their face and the Magistrate had jurisdiction the superior court will not grant the writ of *certiorari* on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter it cannot be deemed to exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute or admits illegal evidence or rejects legal evidence or misdirects itself as to the weight of the evidence or convicts without evidence. On the above principles these are all matters of appeal. They are not matters in respect of which *certiorari* will lie. On the above principles Lord Goddard, C. J., Cassels and Hallett, JJ. in *R.* v. *Rent Tribunal for Paddington* (1947) 1 All. E.R. 448 refused to quash a decision of a tribunal constituted under the Furnished Houses Rent Control Act, 1946 which was good on its face and not outside the jurisdiction of that tribunal. A decision of a lower tribunal which is based on perjured evidence can be quashed—*R.* v. *Recorder of Leicester* (1947) 1 All. E.R. 928. In *R.* v. *Bodmin Justices ex parte McEwen* (1947) 1 All. E.R. 109 the applicant a soldier, during a disturbance in the barrack room, stabbed a fellow soldier in the back with a bayonet as a consequence of which the injured soldier was not expected to live but did in

fact recover. The applicant was charged before petty sessions with wounding with intent to do grievous bodily harm but at the request of both the prosecution and the defence the justices allowed the charge to be reduced to one of unlawful wounding and assuming jurisdiction under the Criminal Justice Act 1925 dealt with the case summarily. An officer of the applicant's unit gave some evidence as to character and said he could say a lot more but thought he had better not do so. The justices having retired to consider their sentence sent for the officer and interviewed him in the absence of the applicant and his adviser. The applicant was sentenced to 6 months' imprisonment. Held by Goddard, C.J., Humphreys and Lewis, JJ. that justice must not only be done but must manifestly be seen to be done and the interviewing by the justices of the officer in the absence of the applicant and his advisers could not be justified and the conviction must be quashed the justices being ordered to pay the costs of the application for *certiorari*. The question whether the three presidency High Courts could issue *certiorari* to run into the mufassal has had a long and controversial history. Sundara Iyer, J. ruled on the basis of the Charter of the Supreme Court 1800 from which the High Courts' present powers are derived that *certiorari* could not run into the mufassal and Sadasiva Iyer, J. in a later case took the opposite view. In *Ryots of Garbhandho* v. *Maharaja of Parlakimedi* (1943) 2 M.L.J. 254, Viscount Simon, L.C. delivering the judgment of the Privy Council definitely accepted Sundara Iyer, J.'s view. In *Lady Dinbai Petit* v. *Noronha* (1945) F.L.J. 170 Coyajee, J. of the Bombay High Court has held that *certiorari* will not lie against a Provincial Government because S. 306 of the 1935 Act exempts a Governor from all proceedings and processes of courts, and issuing process against the Government would mean issuing a process against the Governor who at least forms part of that Government. Coyajee, J. quoted with approval the remarks of Das, J. in *In re Banwarilal Ray* 48 C.W.N. 766 and followed *Venkataratnam* v. *Secretary of State*, 53 Mad. 979.

In *Juggilal Kamalapat* v. *Collector of Bombay* (1945) F.L.J. 300 Bhagwati, J. of the Bombay High Court had to consider the scope of the writ of *certiorari* and the circumstances under which it could be issued by a High Court. In that case the petitioners were a firm of three brothers Sir Padampat Singhania and his two brothers. They had rented a flat in Marine Drive Bombay in 1941. In January 1945 the Collector of Bombay served an order under Rule 75-A of the Defence of India Rules requisitioning the petitioners' flat which was sought to be quashed. The arguments for the Collector of Bombay were as follows: (1) *Certiorari* lies only where the inferior tribunal acts in excess of jurisdiction and not where the tribunal has no jurisdiction at all. Requisitioning of immovable property is not mentioned in any of the legislative lists of the Government of India Act, 1935

and hence unless the Governor-General allocates it either to the centre or to the provinces under S. 104 legislation on that topic is *ultra vires* and hence Rule 75-A Defence of India Rules is *ultra vires* and hence the Collector acted without any jurisdiction at all as opposed to acting in excess of jurisdiction. (2) *Certiorari* lies only to quash judicial acts as opposed to ministerial acts and the act of the Collector in this case was a ministerial act. (3) The writ of *prohibition* has been taken away from the powers of the High Courts by the enactment of S. 45, Specific Relief Act and Clauses 5 and 55 of the Letters Patent also point to such a conclusion. All these arguments were rejected by Bhagwati, J. As regards the first point the judge observed that the absence of any authority to do the act was certainly much worse than mere excess of legal authority and it was inconceivable that the courts could issue the writ where the tribunal acted in excess of authority and at the same time the courts should be helpless where the tribunal was seeking to exercise a jurisdiction which was not at all vested in it. A judicial act implies something more than the mere application of the mind by the authority on the materials placed before him; it has reference to the mode or manner in which the opinion is formed, it implies a proposal and an opposition and a decision on the issue and it vaguely connotes hearing of evidence and opposition. Thus on the second point Bhagwati, J. held that the act of the Collector was a judicial act. On the third point the judge held that Clause 5 of the Letters Patent was general and conferred on the High Courts all the powers of the English High Court including the power to issue the prerogative writs of *mandamus, certiorari, prohibition* etc., and it was not controlled or curtailed by the specific mention of the writs of *mandamus, certiorari* and *error* in Clause 55. The intention was certainly not to take away the power to issue the writ of *prohibition*. No doubt the provisions of the writ of *mandamus* have been enacted in S. 45 of the Specific Relief Act and by S. 50 the High Courts have been prohibited from issuing writs of *mandamus*. But only certain aspects of the writ of *prohibition* have been touched in S. 45 and the result is that in respect of those aspects of the writ not covered by S. 45 the High Court has still power to issue the writ. Where part of the provisions of a particular prerogative writ are embodied in a statute the prerogative writ is not merged *pro tanto* in the statute but the subject would have a concurrent or alternative remedy also under the statute apart from his right to invoke the jurisdiction of the court to issue a prerogative writ in his favour. *Mahomedalli* v. *Jafferbhoy* (1925) 50 Bom. 394 distinguished: *Banwari Lal Ray*, 48 C.W.N. 766 (1944) followed.[61a]

61a. In *Vedachala Mudaliar* v. *The Central Road Traffic Board, Madras* (1948) 1 M.L.J. 322 the Madras High Court quashed the order of the Central Road Traffic Board, Madras passed without jurisdiction, at the instance of a busowner, Madras being one of the termini of the route along which the buses

(*b*) *Quo Warranto.* The High Court of Calcutta had no doubt under the Act of 1781 a territorial jurisdiction over all persons within the town of Calcutta and a personal jurisdiction over servants of the East India Company and even British subjects outside the limits of Calcutta in the case of acts of trespass and wrongs. But this jurisdiction has not been inherited by the present Calcutta High Court because Clause 11 of the Letters Patent of 1865 confines the ordinary original civil jurisdiction of the High Court to the local limits of Calcutta and expressly declares that the ordinary original jurisdiction shall not extend beyond the said limits and the High Courts Act, 1861 lays down that the High Courts shall have all the powers granted by the letters patent. Hence the power to grant an information in the nature of *quo warranto* which is a civil proceeding used to try the civil right to a public office arises in the exercise of the ordinary original civil jurisdiction of the High Court. Such jurisdiction is confined to be town of Calcutta. Hence where the public officer against whom the information in the nature of *quo warranto* is sought to be exhibited does not reside within the town of Calcutta and the office which he is alleged to have usurped is not situate within those limits the High Court has no power to grant the information. The Governor-General on 9th June 1944 under Rule 51-F of the Defence of India Rules appointed the appellant to perform the duties of the Chairman and Commissioners of the Howrah Municipality after superseding the said municipality. On 19th July, 1944 the High Court granted an information in the nature of *quo warranto* against the appellant (1944) 48 C.W.N. 766. On appeal (1947) F.L.J. 50 P. C.) the Privy Council reversed the decision of the High Court and held that information in the nature of *quo warranto* would not lie against the appellant in the said circumstances. In *O. A. O. K. Lakshmanan Chettiar* v. *Commissioner, Corporation of Madras,* 50 Mad. 130 Coutts-Trotter, C.J., Jackson and Sundaram Chetty, JJ., held that the Court will not exercise its discretionary power to issue a writ of *certiorari* in favour of a person who has not taken before the lower Court an objection as to its jurisdiction but has taken the chance of its decision on the merits in his favour. The objection as to jurisdiction may be based on facts or on a contention of law and in both cases the person who has not taken it in the lower Court is debarred from claiming relief through the writ of *certiorari.* In the above case the Commissioner was only empowered to inquire into disabilities appearing on the face of the nomination paper and he could not go into a matter of substance which was arguable only on grounds not appearing on the face of the nomination paper.

---

ran. The transport business was being carried on in part at least in Madras thus investing the High Court with jurisdiction. The fact that the order sought to be quashed can be justified on facts not appearing on the face of the order is irrelevant.

(*c*) *Mandamus : Mandamus* is a peremptory order issuing out of the King's Bench Division of the High Court commanding a body or person to do its or his duty. If a Government department is acting as agent of the Crown and is responsible only to the Crown having no duty to the subject in the matter it is not amenable to the orders of the court in the exercise of its prerogative jurisdiction in granting or refusing *mandamus*. The duty must be an imperative and not a discretionary one, the applicant must have demanded its performance and must have been refused and he should have no other convenient means of compelling its performance. Thus in (1920) 3 K.B. 334 *mandamus* was issued against a tribunal to compel it to hear and determine an appeal. In (1933) 1 K.B. 668 *mandamus* was issued to hold a fresh election of aldermen to a newly created borough council where there had been an irregular election of aldermen. In (1934) 1 K. B. 333[61b] a ratepayer by *mandamus* compelled a local authority to produce its accounts for inspection by his agent. Where, however, a statute prescribes a specific remedy *e.g.*, a complaint to a minister *mandamus* will not lie.

(*d*) *Indian Law :* S. 45 of the Specific Relief Act lays down that the High Courts of Madras, Bombay and Calcutta may within the limits of their ordinary original civil jurisdiction make an order requiring any specific act to be done or forborne by a person holding a public office or a corporation or an inferior court. The application must be made by a person whose property franchise or personal right would be injured by the doing or forbearing of the said act. The doing of the act must be clearly incumbent on the person, corporation or court under any law for the time being in force and the applicant must have no other specific and adequate legal remedy. No orders can be made on the Secretary of State, the Central Government, the Crown Representative or any Provincial Government. S. 50 takes away the power of the High Courts to issue writs of *mandamus*. In *In the matter of G. A. Natesan* (1917) 40 Mad. 125 the Syndicate of the Madras University had made some regulations governing the appointment and duties of professors and these were placed before the Senate for its approval. Prof. K. B. Ramanatha Iyer a Senate Member proposed some amendments which were ruled out of order by the Vice-Chancellor who presided over the Senate meeting. Under Regulation 64 of the University a Senate Member could claim that his protest against resolutions of the Senate should be forwarded to the Government. In accordance with this regulation Prof. Ramanatha Iyer sent his protest to the Registrar for being forwarded to Government. The Registrar refused to forward the protest saying that Regulation 64 related only to resolutions of the Senate and not to rulings of the Vice-Chancellor. Prof. Ramanatha Iyer and another member of

---

61*b*. *R* v. *Bedwelty* U.D.C.

the Senate Rao Bahadur G. A. Natesan asked for a writ of *mandamus* to compel the Registrar to forward the protest to the Government as required by Regulation 64. Coutts-Trotter and Kumaraswami Sastriar, JJ. granted the writ holding that the Syndicate was a person holding a public office and that Regulation 64 which was framed by the University by virtue of powers given to it under the Universities Acts of 1857 and 1904 was 'a law for the time being in force' within the meaning of that phrase as used in S. 45 (*b*). The court has power under S. 45 only to make an order requiring a specific act to be done or forborne : it has no power to make a declaration. Thus it cannot declare that a notification in the Calcutta Gazette notifying that the applicant is debarred from taking part in an examination for a period of 5 years is illegal and *ultra vires*. *In re Provas Chundra Roy,* 40 Cal. 588. Where the Commissioner of Police is given discretion to refuse to grant a licence to a vehicle which he may consider to be insufficiently formed or otherwise not fit for the conveyance of the public, the discretion is not an absolute discretion but must be exercised within the limits prescribed by the statute. Hence if the Commissioner refuses to grant a licence to a conveyance merely because it does not conform to a particular pattern *mandamus* will lie to compel him to grant the licence. A person who has been provisionally appointed a lecturer of a University has no personal right such as would entitle him to apply under S. 45 for an order directing the Senate to continue him in his appointment as lecturer. *In re Abdul Rasul* (1914) 41 All. 518. Recently an interesting question arose in Calcutta as to whether a President of a legislature who had by a slip announced the result of the voting on a motion wrongly could be compelled to stick to his original wrong declaration even though he had afterwards corrected the error. A Full Bench of the Calcutta High Court in *Haridas* v. *Bejoy Prasad*, A.I.R. (1946) Cal. 121 has held that S. 87 of the 1935 Act protects the President of a provincial legislature from interference by a civil court when he is acting in accordance with powers conferred on him but he would not be protected if he was acting in defiance of the provisions of the statute. In this case there was an amendment for the insertion of a comma in a certain section of a bill before the legislature. The President by a slip declared the amendment to have been carried and immediately afterwards corrected himself. No point of order was then raised. It was held that the President was acting in accordance with standing order No. 8 which enjoins the President to give his real opinion and that he was therefore protected. The application was also not *bona fide* since the applicants did not raise a point of order then because they knew fully well that if they demanded a decision they would be defeated. The matter was also absolutely trumpery. Whether the amendment was carried or defeated the legal effect would be absolutely nil. In *Laxmikant Shripat Bhandare* v. *Gerrard*, A.I.R. (1947) Bom. 193, the petitioner Laxmikant who was

a student of the J. J. School of Art, Bombay had written a number of scurrilous articles in the *Blitz* of Bombay charging the Director with manipulation of marks, neglect of duties etc. The Director by his order expelled him from the school and the petitioner wanted that the Director should be prevented from enforcing the order by *mandamus*. Justice Blagden disposed of the case on a preliminary point namely that the affidavit of the petitioner did not fulfil the conditions laid down by S. 46. S. 46 says that every application under S. 45 must be founded upon the affidavit of the person injured stating his right in the matter in question, his demand for justice and denial thereof. In the present case the affidavit did not disclose whether justice had been demanded or not. Even on the merits of the case the petitioner was not entitled to succeed. Even though the articles were written during vacation time scholastic discipline does not cease the moment the gates of the school are closed. In *Rex* v. *Newport (Salap) Justices* (1929) 2 K.B. 416, Avory, J. laid down that a headmaster could cane a boy under 16 years of age who was smoking a cigarette in his spare time in a public street with his father's consent and approval. In *Banerjea* v. *Simonds*, A.I.R. (1947) Cal. 307 the appellant had purchased 497 tons of unserviceable ferrous scrap from the respondent Liaison Officer, Disposals, Gauhati area for Rs. 7,150 and was refused delivery. He wanted *mandamus* to be issued against the respondent for compelling him to deliver the scrap. S. 46 (g) prohibits the court from making any order on any servant of the Crown merely to enforce the satisfaction of a claim upon the Crown. The petition was dismissed by Gentle and Clough, JJ. In *Kandaswami* v. *Province of Madras*, A.I.R. (1947) Mad. 443 the petitioner was a tenant in Francis Joseph Street and had been evicted by his landlord by proceedings before the Rent Controller. The petitioner appealed to the Collector against the order of the Rent Controller and was unsuccessful. He appealed further under the Madras House Rent Control Order, 1945 to the Provincial Government against the order of the Collector on appeal. But prior to the presentation of the appeal the Order had expired and the new law the Madras Buildings Lease and Rent Control Act did not give a right of appeal to the Government. The petitioner's appeal was rejected by Government and he wanted the court to compel the Government by *mandamus* to restore his petition. Gentle and Happell, JJ. held that S. 45 (f) prohibited them from issuing orders of *mandamus* against the Provincial Government.[61c] In *Mody* v. *Rent Controller*, A.I.R. (1947)

61c. In a recent unreported case (*Hindu* 29-9-48) Yahya Ali, J. dismissed a petition under S. 45, Specific Relief Act to compel the Commissioner, Madras Corporation not to allot orange colour to candidates not belonging to the Hindu Mahasabha who were standing for election to the Corporation Council. The petitioner was neither a candidate nor a voter and merely because he was a member of the Hindu Mahasabha he could not claim that his property personal right or franchise was injured by the Commissioner's

Bom. 46 a tenant applied to the Rent Controller for fixing the standard rent of the premises which he was occupying. The landlady then applied for a writ of *certiorari* to quash the order of the Rent Controller. The Rent Control Act provides for an appeal to the Collector. Kania, J. the trial judge held that the failure of the landlady to pursue the remedy of appeal to the Collector given by the Act disentitled her to the grant of *certiorari* but on appeal Stone, C.J. and Chagla, J. took a different view and held that the High Court would interfere by way of *certiorari* even if the appellant had a right of appeal and had not exercised it provided a breach of the fundamental principles of justice was shown and this had not been shown in the present case. Therefore *certiorari* did not lie. In *Globe Theatres* v. *Chief Judge, Small Cause Court*, A.I.R. (1947) Bom. 108 the proprietors of the Regal Cinema in Bombay were assessed to municipal property tax on the basis of $7\frac{1}{2}\%$ on 53% of the seating capacity of the cinema which was a recognised method of arriving at the rateable value where the cinema was run by the owner of the building. The assessment was made in the first instance by the municipality and confirmed on appeal by the Chief Judge, Small Cause Court. Held, even though the judge had not allowed 10% on the annual rent as allowance for repairs etc., it could not be said that he had acted without or in excess of jurisdiction and no *certiorari* will lie. See also *Khetsidas* v. *Pratapmull*, A.I.R. (1946) Cal. 198 ; *Sawday* v. *Singha Roy*, A.I.R. (1946) Cal. 208.

(*e*) *Habeas Corpus :* In India there is no writ of *Habeas Corpus* which is the English law remedy for releasing a person from custody not authorised by law, but there is an analogous remedy in the nature of *Habeas Corpus* provided by S. 491, Cr. P. C.

" S. 491 (1) : Any High Court may whenever it thinks fit direct (*a*) that a person within the limits of its appellate criminal jurisdiction be brought before the Court to be dealt with according to law (*b*) that a person illegally or improperly detained in public or private custody within such limits be set at liberty ; (*c*) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be enquired into in such Court ; (*d*) that a prisoner detained as aforesaid be brought before a Court Martial or any Commissioners for trial or to be examined touching any matter pending before such Court Martial or Commissioners respectively ; (*e*) that a prisoner within such limits be removed from one custody to another for the purpose of trial and; (*f*) that the body of a defendant within such limits be brought in on the sheriff's writ of *cepi corpus* to a writ of attachment. (2) The High Court may from time to time frame

---

order especially when the Government had instructed the Commissioner to allot orange to the Tamil Nad Boundary Committee candidates in view of the fact that the Hindu Mahasabha had chosen not to contest the election.

rules to regulate the procedure in cases under this section. (3) Nothing in this section applies to persons detained under the Bengal State Prisoners' Regulation 1818, Madras Regulation 2 of 1819 or the Bombay Regulation 25 of 1877 or the State Prisoners' Act 1850 or the State Prisoners' Act 1858."

" S. 491-A : Any High Court established by Letters Patent may exercise the powers conferred by S. 491 in the case of any European British subject, within such territories other than those within the limits of its appellate criminal jurisdiction as the Central Government may direct". The remedy under S. 491 is not available for going behind an order appointing guardians for minors—54 Mad. 759. The court has no jurisdiction to award costs under the section 56 Mad. 1049 (F.B.). An order under the Section is appealable—I.L.R. (1946) Nag. 651. A husband whose wife is illegally detained has to proceed under the section and the fact that he has other remedies open to him is no defence—(1947) M.W.N. 527 (Cr.) 123 following (1929) M.W.N. 689 (Cr.) 137. The fact that there is a remedy under the Guardian and Wards Act open for the father is no bar to an application under the section—(1948) M.W.N. (Cr.) 34.

In *Ex. Ruler of Bhajji* v. *Emperor* (1946) F.L.J. 1 (F.C.) the Ruler of Bhajji was deposed and later detained under Regulation 3 of 1818. A petition of *Habeas Corpus* for his release was dismissed by the Federal Court on the ground that the Section did not apply to detentions under Regulation 3 of 1818. Even if the deposition was wrongful there was no remedy. In *C. P. Matthen* v. *Dist. Magistrate Trivandrum* I.L.R. (1939) Mad. 744 (P.C.) the Privy Council held that a rule of the High Court which laid down that applications for *Habeas Corpus* should go before a bench of 2 Judges was valid and that such a power was conferred by S. 491 Criminal Procedure Code. In *Keshava Talpade* v. *Emperor* (1943) 2 M.L.J. 90 the Federal Court held that Rule 26 of the Defence of India Rules was *ultra vires* because it exceeded the rule making power conferred by S. 2 of the Defence of India Act 1939. The Federal Court decision was over-ruled by the Privy Council in *Emperor* v. *Sibnath Banerjea* (1945) F.L.J. 222 (P.C.). In *Emperor* v. *Benoarilal Sharma* (1943) 2 M.L.J. 207 (F.C.) the Federal Court held that the Special Criminal Courts Ordinance II of 1942 was *ultra vires* because it amounted to an abdication of legislative authority, and not a delegation of it, the latter being permissible. The Ordinance set up special Courts where the procedure was summary and the right of appeal was restricted. A Special Court could try only such cases or class of cases as the Provincial Government might by order in writing direct it to try. The Federal Court decision was reversed in (1945) F.L J. 1 (P.C.) on the ground that the Act of 1935 nowhere prohibited the delegation of authority by the legislature to the executive under the circumstances mentioned in the Ordinance. Considerations of jurisprudence or

policy were irrelevant in construing the 1935 Act which was quite self-sufficient, and it was not permissible to travel outside it for interpreting its provisions. See P. 18 *ante.*

(*f*) *Contempt of Court:* Any publication concerning a pending case, trial or judicial investigation, which is calculated to prevent fair and impartial action or which seeks to influence judicial opinion by threats or other forms of intimidation, or which reflects on Counsel, Judges parties or witnesses, constitutes contempt of Court. In *K. L. Gauba* v. *Judges of Lahore High Court*, A.I.R. (1942) F.C. 1 the Federal Court held that it cannot extend its jurisdiction under the guise of punishing a contempt of Court. In that case the Lahore High Court had perversely and maliciously refused to grant a certificate under S. 205 of the 1935 Act for leave to appeal to the Federal Court. It was contended that this amounted to a wanton deprivation of the Federal Court's jurisdiction and hence constituted contempt of Court. But this contention was rejected. In the *Hindustan Times* Contempt case *Debi Prasad Sharma* v. *Emperor* (1943) 2 M.L.J. 568 = 70 I A 216 (P.C.) the paper had criticised a circular of the Chief Justice of the Allahabad High Court calling upon his subordinates to assist in making collections to the War Fund. The Allahabad High Court punished the Editor for contempt, but on appeal the Privy Council reversed the High Court's decision and held that criticising the administrative as opposed to the judicial acts of a Judge did not amount to contempt. The law of contempt does not exist for catering to the vanity of sensitive Judges but has as its purpose the punishment of clear cases of disrespect to judicial authority or interference with the course of justice. In *Saoji* v. *Jather* (1945) F.L.J. 73 a Jail Superintendent deliberately withheld a petition which had been addressed by a prisoner to the High Court. It was held by the Nagpur High Court that this constituted contempt of Court because the Jail Superintendent clearly interfered with the course of justice by his conduct. However frivolous or worthless the petition might be, this was a matter for the High Court and the Jail Superintendent could not refuse to forward a petition on that ground.[62]

---

62. The recent decision of the Full Bench of the Mysore High Court in the Gopala Rao Enquiry Committee Contempt Case (*The Hindu* 11-9-1948, p. 9) is a pronouncement on the law of contempt and on the limits within which it is permissible for the executive to curtail civil liberties. In that case Dharmaratnakara Gopala Rao had carried on various shady commercial transactions resulting ulitmately in a bank crash and a committee was constituted by Government to investigate this fraud. By S. 9 of the Enquiry Committee Special Provisions Amendment Emergency Act 25 of 1948 (6-4-48) the Enquiry Committee was to have power to punish for contempt as if it were the High Court notwithstanding anything in the Contempt of Courts Act 1940. By S. 5 of the Enquiry Committee Special Provisions Second Amendment Emergency Act 53 of 1948 (4-8-48) the High Court was debarred from calling in question any order made by the

(*g*) *General :* The extent to which English law has been introduced into India was considered in *Mayor of Lyons* v. *East India Co.* (1836) 3 St. Tr. (N.S.) 647. The Privy Council laid down in that case that the general introduction of English law into a conquered or ceded country does not draw with it such parts as are manifestly inapplicable to the circumstances of the settlement. Thus the English law incapacitating aliens from holding real property to their own use and transmitting it by devise or descent is inapplicable to India. See *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee* (1863) 2 Moo., P.C. N.S. 22 (forfeiture for suicide)

---

committee under S. 9 of Act 25 of 1948 and the committee was not to be subject to the superintendence of the High Court S. 491 of the Criminal Procedure Code was not to apply to any order made under the Act by a newly added S. 15-B. The Act was also made applicable to the proceedings then pending in the High Court. S. 13 of the Special Enquiry Committee Act 1948 (4-9-1948) validated all orders made, sentences passed etc. by the committee from the date of its constitution.

Under these circumstances the Full Bench of the Mysore High Court dismissed the *habeas corpus* applications of four persons who had been sentenced by the committee. Paramasivayya, C.J. held that the committee could not punish for contempt committed outside the court because the provision that it should have all the powers as if it were the High Court, showed that it was not the High Court which alone had power to punish contempts committed outside the court. See A.I.R. (1944) Bom. 121 (FB). The Chief Justice further went on to say that S. 15-B introduced by Act 53 of 1948 was no bar to the High Court calling in question orders passed without jurisdiction. It has been held that even though S. 16 of the Defence of India Act provides that no order made in the exercise of any power conferred by or under the Defence of India Act shall be called in question in any court the Federal Court as well as the courts in British India have exercised jurisdiction to interfere with the orders made under the Defence of India Act and the rules made thereunder wherever they found that the requirements of the section or the rule under which orders of detention had been made had not been complied with. If the requirements of the provision of law under which the orders of detention are made are not complied with or if there is an abuse or misuse of these provisions such orders of detention cannot really be regarded as orders made under those provisions of law. In the Full Bench decision of the Madras High Court dated 30th July 1948 (relating to the *habeas corpus* applications of persons detained under the provisions of the Madras Maintenance of Public Safety Act 1 of 1947), the Chief Justice laid down that the High Court had power to interfere and set at liberty a person who was being detained by an order which though purporting to be made under S. 2 of Madras Act 1 of 1947 was not in fact such an order. Examples of the latter class of orders were : an order not duly authenticated or an order passed by an officer not empowered under S. 15 of that Act. Having stated the legal position thus, Paramasivayya, C.J. went on to observe that S. 13 of the Special Enquiry Committee Act 1948 which validated all the previous orders and proceedings of the committee was a bar to the grant of relief to the petitioners because the orders in question could no longer be treated as void or illegal for want of jurisdiction. Venkataramaiya and Puttaraj Urs, JJ. concurred. *The Hindu*, Madras in its editorial of 13-9-48 has strongly criticised this attempt on the part of the Executive in Mysore to nullify judicial decisions or to forestall them in order to render the powers of the Courts inoperative.

and Sir Courtney Ilbert "*Digest of Statutory Enactments*" (3rd Ed.) P. 279.[62a]

(*h*) *Letters Patents of the Madras, Bombay and Calcutta High Courts.*—(28-12-1865).

Clause 12: The High Court has original jurisdiction where the property is situated or the cause of action arises wholly within its jurisdiction. In other cases the leave of the court has to be obtained. *Clause* 13: The High Court can remove any case pending before a subordinate Court and try it itself. *Clause* 15: An appeal lies to the High Court from a judgment of a single judge of the High Court or one judge of any division Court pursuant to S. 108 Government of India Act made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, where the judge who passed the judgment declares that the case is a fit one for appeal.

62a. In *R.* v. *Chancellor of St. Edmundsbury and Ipswich Ex-parte White* (1947) 1 K.B. 263 Lord Goddard, L.C.J. delivering the judgment of the Divisional Bench (Lord Goddard, L.C.J., Lewis and Oliver, JJ.) has pointed out the distinction between the writs of *certiorari* and *prohibition*. "It does not follow that because prohibition would lie *certiorari* must lie for the reason that spiritual Courts are not inferior to this Court..... Ecclesiastical Courts are not inferior Courts and judges of Common Law Courts have no knowledge of or at least are not experienced in, the system of law administered by ecclesiastical Courts and could not presume to examine their records for the purpose of correcting their judgments." In the above (1947) 1: K.B. 263 case it was held that no *certiorari* lies to ecclesiastical Courts and the following remarks of Atkin, L.J. in *R.* v. *Electricity Commissioners* (1924) 1 K.B. 171 were quoted with approval: "Prohibition restrains a tribunal from proceeding further in excess of jurisdiction—*Certiorari* requires the record of the order of the Court to be sent up to the King's Bench Division to have its legality enquired into and if necessary to have the order quashed." The writ of *prohibition* has been described as a judicial writ issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it was not legally vested, or in other words to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction. See the remarks of Viscount Cave in *Clifford & Sullivan* (1921) A.C. 570 Keir & Lawson *Cases on Constitutional Law* (2nd Edn. p. 398) Dicey *Law of the Constitution* (9th Edn.) p. 523 Jennings *Law & The Constitution* (2nd. Edn.) p. 197. In *Clifford's case* the appellant was being tried by a military Court which did not purport to act under any commission from His Majesty to try prisoners or under any statutory or common law authority or as a court martial but which consisted merely of officers carrying out instructions from the General Officer Commanding. Held there was no precedent for granting *prohibition* against a body which had no statutory or common law athuority to try cases and pass judgments and therefore appellant was not entitled to the issue of the writ in his favour. There is nothing irregular or unlawful in imposing a Punitive tax on the inhabitants of any particular area to recover the cost of sending additional police to the area because a riot had broken out in that area. The persons affected will not be entitled to a writ of *prohibition—R.D. Patterson* v. *District Commissioner Accra*, 2 D.L.R. 829 (P.C).

Clause 17: continues the jurisdiction in respect of the persons and estates of infants, idiots and lunatics, which the High Courts possessed before. *Clause* 25: No appeal lies from a sentence or order of the High Court in the exercise of original criminal jurisdiction but the Court may reserve any point of law for the opinion of the High Court. *Clause* 26: The High Court can review a case tried by it in the exercise of original criminal jurisdiction on the Advocate-General certifying that in his judgment there is an error in the decision on a point of law. S. 411-A of the Criminal Procedure Code 1898 (added newly by Act 26 of 1943) gives persons tried by the High Court in the exercise of its original criminal jurisdiction a right of appeal to the High Court on a question of law and such persons with the leave of the appellate Court or upon the certificate of the judge who tried the case can also appeal against the conviction on questions of fact. The scope of the section was recently considered by the Privy Council in *M. K. Thyagaraja Bhagavathar* v. *Emperor* (1947) M.W.N. 330 (reversing (1946) M.W.N. 49).[62b]

(4) Special Jurisdiction of High Courts:

The High Court also possesses various kinds of special jurisdiction under the following Acts: By S. 3 of the Presidency Towns Insolvency Act 3 of 1909 the High Courts of Madras, Bombay and Calcutta and the Court of the Judicial Commissioner, Sind, are the Courts having jurisdiction under the Act. By S. 4 the jurisdiction can be exercised by a single judge assigned for the purpose by the Chief Justice, and in chambers. S. 41 of the Indian Railways Act 9 of 1890 provides that except as provided in that Act no suit shall be instituted or proceedings taken for anything done or any omission made by a railway administration in violation or contravention of any provision of Chapter V. Under S. 181-A of the Sea Customs Act 8 of 1878 the Chief Customs Officer may detain any package which he suspects to contain any seditious newspaper, book or document. The Provincial Government may pass orders as to the disposal of the package and any person interested in it may apply to the Provincial Government for release of the same. S. 181-B. provides that every application under S. 181-A shall be heard by a special bench of the High Court constituted under S. 99-C of the Code of Criminal Procedure 1898.

62b. S. 223.—S. 112 of the Government of India Act 1915 which has been preserved by S. 223 of the 1935 Act and which directs suits relating to certain matters to be decided according to the law of the defendant does not cover a suit relating to marriage—*Per* Chakravarti and Ellis, JJ. in *Rakeya Bibi* v. *Anil Kumar*, 52 C.W.N. 142. S. 212.—A decision of the Privy Council in an appeal from one part of the Empire is not binding on courts in another part of the Empire—*Sunderdas Vishindas* v. *Governor-General in Council*, I.L.R. (1946) Kar. 416.

S. 181-C bars the jurisdiction of Courts to call in question orders passed under S. 181-A. S. 56 (2) of the Stamp Act 2 of 1899 lays down that the Collector acting under Ss. 31, 40 or 41 of the Act may, if he has any doubt as to the amount of stamp duty chargeable for an instrument, draw up a statement of the case and refer it to the Chief Controlling Revenue Authority, who in turn may state the case and refer it to the High Court. S. 57 lays down that every such case shall be decided by a bench of not less than three judges of the High Court. S. 60 deals with statements of cases and references by other Courts to the High Court. Under S. 46 of the Trade-marks Act 5 of 1940 the High Court or the Registrar of Trade-marks on the application of an aggrieved person, can cancel or vary the registration and rectify the register of trade-marks. By S. 73 a suit for an infringement of trade-mark cannot be instituted in any court inferior to a District Court. Under S. 6 of the Trustees Act 27 of 1866 the High Court has power to transfer stock or Government Securities of lunatic trustees and mortgagees. Under S. 27 of the Workmen's Compensation Act 8 of 1923 a Commissioner for Workmen's Compensation may if he thinks fit submit any question of law for the decision of the High Court. By S. 30 appeals lie in the cases mentioned in clauses (*a*) to (*e*) to the High Court from the orders of the Commissioner.

Under S. 1 of the Indian and Colonial Divorce Jurisdiction Act 1926 the High Court has jurisdiction to make a decree for a dissolution of a marriage where the parties are British subjects domiciled in England or Scotland. By S. 2 of the Colonial Courts of Admiralty (India) Act 16 of 1891 the Madras, Bombay, and Calcutta High Courts and the District Court of Karachi are Colonial Courts of Admiralty. S. 2 of the Contempt of Courts Act 12 of 1926 provides that High Courts established by Letters Patent have jurisdiction to punish contempts of Courts subordinate to them, in the same manner as they have jurisdiction to punish contempts of themselves. Under S. 8 of the Divorce Act 4 of 1869 the High Court may remove a case from a District Court and try it itself or transfer it to another District Judge. Under S. 9 a District Court can make a reference on a question of law to the High Court. Under S. 14 of the Guardian and Wards Act 8 of 1890, in the case of simultaneous proceedings for the appointment or declaration of a guardian of a minor in different Courts subordinate to the same High Court, they shall report the case to the High Court and it shall determine in which Court the proceedings can be had. Under S. 66 of the Indian Income-Tax Act 11 of 1922 the appellate tribunal may on the application of the assessee or Commissioner, state a case involving a question of law and refer it to the High Court. Such references have to be heard by a bench of not less than two judges of the High Court. Under S. 37 of the Indian Lunacy Act 4 of 1912, jurisdiction in lunacy in the presidency towns is vested in the High Courts of Calcutta, Madras and Bombay.

(5) Subordinate Civil Courts :

(*a*) *At the Presidency Town* : By the Madras City Civil Court Act 7 of 1892 the City Civil Court, Madras has jurisdiction to try all civil suits not exceeding Rs. 2,500 in value arising within the City of Madras except suits involving admiralty, testamentary, matrimonial, or insolvency jurisdiction, or cognizable by a Small Cause Court.[63] Under S. 21 of the Presidency Small Cause Courts Act 1882, suits against officers of the Small Cause Court and of more than Rs. 1,000 in value, may be instituted in the High Court. The plaintiff in a suit between Rs. 1,000 and 2,000 in value can take it to the High Court but if the value is between Rs. 2,000 and Rs. 2,500 he must file it in the City Civil Court. This anomaly has been removed by Madras Act 5 of 1916 which permits the institution of such suits in the City Civil Court. The Presidency Small Cause Courts Act 15 of 1882 gives Presidency Small Cause Courts jurisdiction in all cases where the value of the suit does not exceed Rs. 2,000 where the suit is of a civil nature, and the cause of action arises within the local limits of its jurisdiction. Clauses (*a*) to (*o*) of S. 19 lay down the cases where the jurisdiction of the Court is excluded. The Court has no jurisdiction to try suits of the following kinds : Suits for specific performance, injunction or cancellation of instruments, to enforce trusts, for dissolving partnerships, suits for compensation, for collision on the high seas, for recovering possession of immoveable property, or for foreclosure or redemption of a mortgage, suits in respect of acts done by a judge in the execution of his office, suits for general average loss, and suits for infringement of patent, copyright, or trade-mark.

(*b*) *Outside the Presidency Towns* : Under the Madras Civil Courts Act 3 of 1873, S. 12 the lowest courts of civil jurisdiction outside the presidency towns, namely District Munsif's Courts, have jurisdiction to try suits whose value does not exceed Rs. 2,500. Now by an amendment of 1916 they can try suits not exceeding Rs. 3,000 in value.

(6) Subordinate Criminal Courts :

Under S. 32 of the Code of Criminal Procedure, Act 5 of 1898, Third Class Magistrates are the officers presiding over the Courts

---

63. The City Civil Court :

The jurisdiction of the Madras City Civil Court was enhanced by an amendment made to the Madras City Civil Court Act 1892 by Madras Act 1 of 1935 which added a new section 3-A to the former Act : ' Subject to exceptions specified in S. 3 the Local Government may by notification in the official Gazette invest the City Civil Court with, jurisdiction to receive, try, and dispose of all suits and other proceedings of a civil nature arising within the city of Madras and of such value not exceeding Rs. 10,000 as may be specified in the notification.' By G.O. No. Misc. 1018 (Law) Gen. dated 22-3-35 the City Civil Court has been invested with jurisdiction to try civil suits whose value does not exceed Rs. 5,000.

having the lowest criminal jurisdiction. They can award a sentence of imprisonment not exceeding one month and impose a fine not exceeding Rs. 50. Second Class Magistrates can impose fines up to Rs. 200 and award sentence of imprisonment not exceeding 6 months including solitary confinement. Presidency and First Class Magistrates can impose fines up to Rs. 1,000 and give sentences of imprisonment up to 2 years including solitary confinement and whipping. By S. 31 Assistant Sessions Judges can award any sentence except that of death or transportation or imprisonment for more than seven years. Sessions Judges can pass any sentence, but a sentence of death requires the confirmation of the High Court. High Court judges may impose any sentence authorised by law.

Section 224 deals with the superintendence exercised by a High Court over all courts subject to its appellate jurisdiction. S. 225 deals with the transfer of cases pending in inferior courts, involving constitutional questions, to the High Court. If the case involves the validity of a Federal Act the application has to be made by the Advocate-General of India and if it involves the validity of a provincial law by the Advocate-General of a province. Suppose in a criminal case a constitutional point is also involved. In such cases the right of the accused under the Criminal Procedure Code to apply for transfer of the case is perhaps taken away by S. 225 and only the Advocate-General is competent to file such an application. S. 226 provides that the High Court shall have no original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country, or the law for the time being in force. This section has a long history behind it and was intended to undo the mischief wrought by the Regulating Act 1773 which left the respective jurisdictions of the Supreme Court and of the Governor-Generals' Council vague and which consequently led to unseemly tussles between the two bodies culminating in the famous *Patna* and *Cossijurah Cases*. It was retained long after it had outlived its usefulness and the Draft Constitution of India has now weeded it out. This section was recently interpreted in *Governor-General in Council* v. *Shiromani Sugar Mills Ltd.*, A.I.R. (1946) F.C.16. In that case a company went into liquidation in 1941 and in 1943 it was assessed to income-tax for the years 1941 and 1942 and the tax authorities proceeded to recover the tax amount under S. 46, Income-Tax Act as an arrear of land revenue. The liquidator objected to this and contended that the leave of the Court under S. 171, Companies Act should have been obtained for such a procedure. The Allahabad High Court held that its jurisdiction was not ousted because although the act was one ordered or done in the collection of revenue it was not done under the law for the time being in force, which term also included the Companies Act whose provisions had not been complied with. The Federal Court reversed

the High Court's decision and held that if a Government official *bona fide* and not absurdly believes that any act which he is doing is one under the law for the time being in force, then it shall be deemed to be an act done under such law even though actually the provisions of law have not been satisfied. The High Court when hearing a case referred to it by the Chief Controlling Revenue Authority under S. 59, Stamp Act is not exercising orginal jurisdiction. It is not at all concerned with the collection of revenue so as to attract the operation of S. 226—*Chief Controlling Revenue Authority Bombay* v. *Maharashtra Sugar Mills Ltd.*, 49 Bom. L.R. 893.

S. 227 enacts that English shall be the language of the High Court. S. 228 makes the salaries, allowances, pensions of judges, officers and servants of the High Court non-votable. S. 229 deals with the establishment of new High Courts. If a provincial legislature presents an address in that behalf to His Majesty, His Majesty may by letters patent constitute a High Court for the province, reconstitute any existing High Court, or amalgamate two High Courts. In the second and third of the above mentioned cases the letters patent may provide for the continuance in office of existing judges etc. of the 2 courts and for disposal of pending matters. Under S. 230 if the two concerned governments agree the jurisdiction of a High Court in any province may be extended by His Majesty in Council to any area in British India not forming part of that province. The legislature of the province in which the Court has its principal seat has no power to increase restrict or abolish the jurisdiction. The legislature of the area over which jurisdiction is exercised has power to legislate regarding the jurisdiction of the Court in relation to that area in the same way as it would have been competent to pass such a law if the principal seat of the Court were in that area. It is interesting to compare S. 230 with the corresponding provision in the Draft Constitution of India. Under the Draft Constitution Parliament alone is competent to invest a High Court with such extra-statal jurisdiction. In the case of Governors' provinces, Chief Commissioners' provinces and Andamans the consent of the State in which the Court has its principal jurisdiction has to be obtained. In the case of states in Division A of Part III (like Mysore, Gwalior etc.) their consent has to be obtained before jurisdiction can be extended to such a state (Article 207).[64 to 100].

---

64 to 100. **The English Judicial System :**

At the bottom are the County Courts with the following jurisdiction : (i) Actions in contract and tort where the claim does not exceed £200. (ii) Actions of an equitable nature such as the administration of estates, trusts etc. (iii) Questions of title to land where neither the value nor the rent exceeds £100. (iv) Probate, (real property up to £300 and personal property up to £200). The High Court of justice has three divisions, King's Bench, Chancery, Probate, Divorce and Admiralty. The King's Bench consists

of a Lord Chief Justice and 10 puisne judges, the Chancery of a Lord Chancellor and six puisnes and the Probate of a President and four puisnes. Three additional judges were authorised by the Supreme Court of Judicature (Amendment) Act, 1944. A divisional Court is a tribunal consisting of 2 or more judges of the High Court with a jurisdiction partly appellate and partly original. A Divisional Court of the King's Bench Division can issue prerogative writs of *Habeas Corpus, Certiorari, mandamus,* etc., hear appeals from inferior Courts other than county Courts (from which appeals lie directly to the Court of Appeal). The grouping of wills, wives and wrecks in the Probate Division has been criticised and it is proposed to assign Probate to Chancery and transfer the rest of the jurisdiction to the King's Bench. The Court of Appeal consists of the Lord Chancellor, ex-Lord Chancellors, Lords of Appeal who consent to act, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and eight Lord Justices of Appeal. It exercises the jurisdiction formerly exercised by the Lord Chancellor and the Court of Appeal in Chancery and the Court of the Exchequer Chamber. The personnel of the Judicial Committee and of the House of Lords tends to overlap. There are now seven Lords of Appeal in Ordinary. The salary of a County Court judge is £2,000 a year, of a High Court judge or Lord Justice £5,000 a year and of Lords of Appeal £6,000 a year. The Court of Criminal Appeal consists of the Lord Chief Justice and all judges of the King's Bench Division. Only where the Attorney-General certifies that a point of law of exceptional importance is involved in the decision, an appeal lies to the House of Lords. Both the Court of Appeal and House of Lords are bound by their previous decisions.

CHAPTER X

DISTRIBUTION OF LEGISLATIVE POWERS

(Ss. 99–110 and 7th Schedule)

(1) General :

The problem of where legislative power resides in a particular case can best be considered by reference to legislative prohibition. Legislation of the following kinds is absolutely prohibited to the Federal Legislature :—

(1) Pertaining to items in the provincial list [1] except when a proclamation of emergency under S. 102 is in force in which case the Federal Legislature has power to legislate on provincial items. (2) Laws affecting the Sovereign or Royal Family or the Succession to the Throne, Sovereignty of the Crown in any part of India or affecting the law of British Nationality, the Army, Air Force or Naval Discipline Act, or the law of Prize Courts [2] or amending the 1935 Act or Orders in Council made thereunder or any rules made under the 1935 Act by the Secretary of State for India, the Governor-General or Governor (except in the two cases mentioned in Ss. 206 and 308)[3] or derogating from the prerogative right of His Majesty to grant special leave to appeal from any Court.[4] (3) A law which is not for the whole or any part of British India or for a federated State.[5] (4) A law applicable to a federated State which goes beyond the limitations contained in the Instrument of Accession of the State.[6] (5) A law which amends the provisions of the 1935 Act other than those mentioned in the 2nd Schedule even when it is passed by the authority of Parliament.[7] (6) A law authorising the compulsory acquisition of land for public purposes without the payment of compensation.[8] (7) A law subjecting persons to disability by reason of race, religion etc.[9]

In the case of Federal Legislation of the following types there is a partial prohibition :—

(1) A law which implements a treaty cannot be made unless the consent of the Governor of the Province or the Ruler of the Federated State as the case may be has been obtained.[10] (2) Bills repealing Acts of the Parliament of United Kingdom, Governor-General's or Governor's Act or Ordinance, affecting matters in respect of which the Governor-General is required to act in his discretion, repealing police Acts, affecting the criminal procedure applicable to European British subjects, subjecting persons not

---

1. S. 100 (3). 2. S. 110 (*b*) (i). 3. S. 110 (*b*) (ii). 4. S. 110 (*b*) (iii). 5. S. 99 (1). 6. S. 101. 7. S. 6 (5). 8. S. 299 (2) (*a*). 9. S. 298 (1). 10. S. 106.

resident in British India to greater taxation than persons resident in British India, or affecting the grant of relief from any federal tax on income in respect of income taxed in the United Kindgom, cannot be moved in the federal legislature without the Governor-General's previous sanction.[11] (3) Further proceedings in respect of bills affecting the discharge of the special responsibilities of the Governor-General can be stopped by him.[12] (4) Bills imposing any tax, regulating the borrowing of money etc., cannot be introduced except on the recommendation of the Governor-General.[13] (5) In the case of the following classes of bills the sanction of the Governor-General in his discretion is requisite for their introduction into the federal legislature. (*a*) Bills which prescribe the professional or technical qualifications which are to be requisite for any purpose in India or which impose by reference to any professional etc., qualification any disability, liability etc.[14] (*b*) A bill which authorises the giving of directions to a province as to the execution therein of federal laws.[15] (*c*) Bills imposing or varying the meaning of the term "agricultural income".[16] (*d*) Bills affecting the coinage or currency of the Federation or the constitution or functions of the Reserve Bank.[17] (*e*) Bills amending the 8th Schedule to the Act.[18] (*f*) Bills regulating railway rates or fares cannot be moved in the federal legislature except on the Governor-General's recommendation.[19] (*g*) Bills conferring enlarged civil appellate jurisdiction on the Federal Court.[20] (*h*) Bills providing for the exercise of additional functions by the Federal Public Service Commission.[21] (*i*) Bills restricting or abolishing the protection afforded to certain servants of the Crown in India by S. 197, Criminal Procedure Code and Ss. 80–82 of the Civil Procedure Code.[22] (*j*) Bills making provision for the transference to public ownership of any land.[23] (*k*) Bills in exercise of powers conferred by the India (Central Government and Legislature) Act 1946.[24]

Legislation of the following kinds is absolutely prohibited to the provincial legislatures :—

(1) Pertaining to items in the Federal list.[25] (2) Legislation which is not for the province or for any part thereof.[26] (3) Legislation affecting the Royal Family, succession to the Throne, Army Act etc.[27] amending the 1935 Act, or Orders in Council made thereunder[28] or abolishing appeals to the Privy Council.[29] (4) Bills restricting the entry into the province of goods or discriminating in favour of goods produced there as against other goods.[30]

---

11. S. 108 (1). 12. S. 40 (2). 13. S. 37 (1). 14. S. 119 (1). 15. S. 126 (2) proviso. 16. S. 141 (1). 17. S. 153. 18. S. 182 (2). 19. S. 192. 20. S. 206 (3). 21. S. 267 proviso (*a*). 22. S. 271 (1). 23. S. 299 (3). 24. 9 & 10 Geo. VI, C. 39, Ss. 2 (1) (3). 25. S. 100 (1). 26. S. 99 (1). 27. S. 110 (*b*) (*i*). 28. S. 110 (*b*) (ii). 29. S. 110 (*b*) (iii). 30. S. 297 (2).

In the case of provincial legislation of the following kinds there is a partial prohibition :

(1) Bills imposing taxes or regulating the borrowing of money have to be introduced on the recommendation of the Governor.[31] (2) The provisions of S. 83 can be abrogated by a provincial legislative assembly by a majority including at least three-fourths of the members of the Assembly.[32] (3) The Governor in his discretion can stop further discussion on a bill which would affect the discharge of his special responsibilities.[33] (4) Provincial Bills repealing Acts of the British Parliament, etc., repealing etc. Governor-General's Acts, Ordinances etc., affecting the discretionary sphere of the Governor-General or the procedure for the trial of European, British subjects, require the Governor-General's previous sanction[34] and bills repealing etc. Governor's Acts or Ordinances or repealing etc. Police Acts require the Governor's previous sanction.[35] (5) Bills which impose professional or technical qualifications etc., require a similar sanction.[36] (6) Bills providing for the exercise of additional functions by a Provincial Public Service Commission require the Governor's previous sanction.[37] (7) Bills abolishing or restricting the protection afforded to servants of the Crown by S. 197 Criminal Procedure Code and Ss. 80 to 82 of the Civil Procedure Code require the Governor's sanction.[38] (8) Bills transferring land to public ownership require the Governor's previous sanction.[39]

In regard to matters not covered by any of the 3 lists in the 7th Schedule the legislative power resides in that legislature to which such power is allotted by the Governor-General acting in his discretion by public notification. See now India (Proclamations of Emergency) Act 1945 (9 & 10 Geo. VI, C. 23) S. 1, under which when a proclamation under S. 102 is in force the Federal Legislature can legislate with respect to matters not covered by any of the 3 lists in the 7th Schedule. S. 1 of that Act came into force retrospectively with effect from 1-4-37.

The force of the words " with respect to " occurring in all the 3 sub-sections of S. 100 is to import the pith and substance rule (See p. 15 *ante*) which has established itself firmly in Canada. The correct interpretation of S. 100 is not to interpret it literally and subtract from list 3 of 7th Schedule, all items contained in lists 1 and 2 and from list 2 all items contained in list 1 as was done by Meredith, J., in *Sagar Mal Marwari* v. *Bhuthu Ram*.[39a]

If the substantial character of the legislation pertains to matters in list 2 such a provincial law is *intra vires*. In this connection the doctrine of *intra vires* has to be clearly distinguished from the doctrine of repugnancy, and the mixing up of the two has created

---

31. S. 82 (1). 32. S. 83 (2). 33. S. 86 (2). 34. S. 108 (2) (*a*) to (*d*) 35. S. 108 (2) (i) (ii). 36. S. 119 (1). 37. S. 267 proviso. 38. S. 271 (1). 39. S. 299 (3). 39*a*. (1940) 3. F.L.J. H.C. 119.

much confusion. If a provincial law is *ultra vires* there is nothing to consider and the case is a simple one the law being totally invalid. If the provincial law is *intra vires* further questions arise which have to be answered before it can be pronounced valid. Does it come under S. 107 (1) or S. 107 (2) ? In the former case the law is invalid and in the latter case it is valid. Sulaiman, J., in *Subramania Chettiar* v. *Muthuswami Gounden*[40] expressed *obiter* the view that S. 107 (1) was not exhaustive of all types of repugnancy and that where a provincial law collided with an existing Indian law with respect to a matter in list 1, 7th Schedule, it might go under. It would be unjust to import the pith and substance rule into the interpretation of the 1935 Act without also importing the cognate rule that where the field is occupied by a central law, the provincial law is invalid even though it is quite *intra vires* the provincial legislature, on the ground that it has to give place to a superior law. This doctrine is known as the " doctrine of occupied field " and the Federal Court had no occasion to directly pronounce on the applicability of the doctrine to the interpretation of the 1935 Act.[41]

(2) Amendments to Ss. 99–110 :

Ss. 99 (2), 104 (2), 105, 108 and 110 have been omitted by the India Provisional Constitution Order, 1947. In S. 99 (1) for, " for the whole or any part of British India or for any federated state " the words " (including laws having extra-territorial operation) for the whole or any part of the Dominion " have been substituted by the same Order of 1947, which has also for S. 102 (3) substituted the following :— " A proclamation of Emergency may be revoked by a subsequent Proclamation." In S. 107 (2) " or for the signification of His Majesty's pleasure " and " or of His Majesty " have been omitted. In S. 109 (2) (a) " or by the Governor-General " has been substituted ; in S. 109 (2) (b) " by the Governor-General " has been substituted for " either by the Governor-General or by His Majesty."

(2-*a*) Indian Legislature—Its Character :

Queen-Empress v. *Burah* (1878) L. R. 3 App. Cas. 889 (The validity of an Act of the Indian Legislature removing Garo Hills from the jurisdiction of the ordinary Courts and vesting the administration of civil and criminal justice in these areas in officers appointed by the Lieutenant-Governor of Bengal was questioned in this case). In that case Lord Selborne delivering the judgment of the Privy Council said :

" The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe these powers. But when acting within

---

40. (1940) 3 F.L.J. 157 (F.C.). 41. (1947) F.L.J. 34 (P.C.). (at p. 38).

these limits it is not in any sense an agent or delegate of the Imperial Parliament but has and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself. The established Courts of Justice when a question arises whether the prescribed limits have been exceeded must of necessity determine that question and the only way in which they can properly do so is by looking to the terms of the instrument by which affirmatively the legislative powers were created and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which that power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it) it is not for any Court of Justice to inquire further or to enlarge constructively those conditions and restrictions."

The Governor-General in Council has no power to make any law affecting the authority of Parliament or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the Crown over any part of British India. (Ilbert *Government of India*, P. 226). Ilbert is of the view that the words "or the sovereignty" are connecting with "affecting" and hence cession of territory is placed beyond the powers of the Indian Legislature. See also *Lachmi Narain* v. *Raja Pratab Singh* 2 All. 1. and Debates in Parliament in 1890 on the Cession of Heligoland and S. 110 (*b*) (i) of the 1935 Act.

We shall proceed to consider the more important among the Ss. 99–110 under the following headings :—(i) Extra-territorial Powers of the Federal legislature (S. 99). (ii) Power of Federal legislature to legislate on provincial items in an emergency (S. 102). (iii) Residuary powers of legislation (S. 104). (iv) Power of Federal legislature to implement Treaties (S. 106). (v) Restrictions on Legislative Powers (Ss. 108–110). (vi) Interpretation of items in the legislative lists in 7th Schedule. (vii) Repugnancy between Provincial and Federal Laws.

(3) Extra-Territorial Powers of the Federal Legislature :

The main difficulty which confronts one when premising the extent of the extra-territorial power possessed by any legislature is the fact that the dividing line between territorial and extra-territorial legislation is very thin and there are no definite tests to find out whether legislation belongs to the former or the latter category. The degree of connection between the legislature and the subject of the law made by it which would be sufficient to stamp it with the character of territorial legislation is a topic on which authorities are by no means unanimous.

The further question as to what is the permissible limit within which a legislature can make laws of an extra-territorial character is still more difficult to answer. *Trustees Executors and Agency Ltd.* v.

Federal Commissioner of Taxation[42] is an illustration of the first kind of difficulty. In that case Evatt, J. held that it was not incompetent under the Estate Duty Assessment Act 1914–18 to require the inclusion in the total of an estate for death duties of the value of moveables outside Australia which had passed from a deceased person domiciled at the time of his death in Australia by gift *inter vivos* within a year, before death. An illustration of the second type of difficulty is furnished by *Croft* v. *Dunphy* [43] where Lord Macmillan observed : " It has been recognised that for certain purposes notably the case of police, revenue, public health and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory—When a power is conferred to legislate on a particular topic it is important in determining the scope of the power to have regard to what is ordinarily treated as embraced within the topic in the legislative practice, and particularly in the legislative practice of the State which has conferred the power ". In *Croft* v. *Dunphy*[43] the Privy Council upheld the validity of the Revised Customs Act, 1927 of Canada [43a] which authorises the Customs officials to enter any ship which they suspect carries dutiable goods and seize and forfeit them if it is within 3 marine miles in the case of any ship, and within 12 marine miles in the case of ships registered in Canada. In *Attorney-General for Canada* v. *Cain*[44] the Privy Council held that power to expel aliens who had entered Canada contrary to the laws of the dominion given by statute to the Dominion Government by the Alien Labour Act[45] impliedly gave it also power to impose that extra-territorial restraint which was necessary to enable it to expel those aliens from its borders. In *Earl Russell's case*[46] effect was given to an Imperial Act of 1861 which punished bigamy committed by a British subject, outside England. This shows the unlimited legislative power which the Mother of Parliaments theoretically possesses. In the *Franconia case*[47] 7 out of 13 judges held that the jurisdiction of the British Courts ceased at low water mark. By the Territorial Waters Jurisdiction Act[48] jurisdiction has been extended up to one marine league off the coast measured from low water mark. In *Secretary of State* v. *Chellikani Rama Rao*[49] the Privy Council has held that islands in the sea situated within 3 miles of the coast belong to the Crown. The Statute of Westminster has not cleared up the matter since S. 3 says that it is hereby declared that a Dominion Parliament has extra-territorial powers of legislation. The use of the present tense is ambiguous and is consistent with the intention

---

42. (1933) 49 C.L.R. 220.
43. (1933) A.C. 156 (P.C.)
43-*a*. As amended by 18 & 19 Geo. V, C. 16, S. 157.
44. (1906) A.C. 542.
45. 60 & 61 Vict., C. 11 as amended by 1 Edw. VII, C. 13.
46. (1901) A. C. 446.
47. (1876) 2 Ex. D. 63.
48. 41 & 42 Vict. C. 73.
49. (1900) A.C. 48 (P.C.)

to continue the existing legal position as well as with an intention to confer more plenary powers.

S. 99 gives power to the Federal Legislature to make laws for the whole or part of British India or for any Federated State. 'British India' includes Governors' provinces, Chief Commissioners' Provinces and Berar,[50 to 100] but does not include tribal areas or cantonment areas. The trouble with S. 99 is that in S. 99 (2) clauses (*a*) to (*e*), five instances have been singled out in which the federal legislature is expressly given extra-territorial powers of legislation. Sub-section (2) can be construed either as affording specific illustrations of the plenary power of legislation conferred by sub-section (1) or as prohibiting extra-territorial legislation not coming within the five categories mentioned therein. In *Governor-General in Council* v. *Raleigh Investment Co., Ltd.*[1] the Federal Court held that the former is the correct interpretation. The plaintiff company incorporated in England and having its registered office there held the bulk of the shares in 11 companies carrying on business in India, two of them being incorporated in India and having their offices there and the rest being incorporated in England and having their offices in England. The latter companies called sterling companies declared their dividends in England. The plaintiff was assessed to income-tax and super-tax under S. 4 (1) (*c*) and S. 4 (1), Explanation 3 of the Indian Income-tax Act, 1922 in respect of dividends paid to him by the sterling companies. The plaintiff sued for a declaration that S. 4 was *ultra vires* the powers of the Indian Legislature. The Federal Court held, firstly, that the source of the dividends paid to the plaintiff company was British Indian and on that basis the Indian Legislature was not giving its law any extra-territorial operation and alternatively, that a comparison of the language of S. 65—Government of India Act 1915 with the corresponding words in S. 99 (1) of the 1935 Act, showed that plenary powers of extra-territorial legislation were intended to be conferred on the federal legislature by Parliament through the 1935 Act—The 1915 Act conferred on the Indian Legislature power to make laws for all persons, Courts, places and things within British India. That the federal legislature's power of extra-territorial legislation is not confined to Clauses (*a*) to (*e*) of S. 99 (2) is clear from Entry 23 in List 1, 7th Schedule relating to fishing and fisheries beyond territorial waters. Though the Statute of Westminster is not applicable to India, the 1935 Act has to be interpreted in the light of the discussions on this subject which had been taking place between 1926 and 1935. On appeal[2] the Privy Council did not directly consider the point arising out of S. 99 but disposed of the case on the basis of S. 67, Income-tax Act, 1922 which barred the jurisdiction of Civil Courts to try suits brought

---

50 to 100. S., 311 (1), 47 (1).

1. (1944) 1 F.L.J. 131 (F.C.).
2. (1947) 10 F.L.J. 45 (P.C.).

to set aside or modify an assessment made under the Act. The circumstance that the assessment is not accurate in point of law and that the assessing officer has taken into account an *ultra vires* provision of the Act is immaterial in determining whether the assessment is made under the Act. The use of the machinery provided by the Act, not the result of that use is the test—Even on the assumption that S. 4 of the Income-tax Act, 1922 was beyond the lawmaking powers of the Indian Legislature, plaintiff's suit was barred having regard to S. 67, Income-tax Act. In *Wallace Brothers & Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[3] the appellant company was incorporated in England and its management and control were in England. It was the sleeping partner of the firm of Wallace & Co. which was carrying on business in Bombay. It made in 1938–39 an income of 17 lacs inside British India and Rs. 7,48,427 outside British India. The question before the Privy Council was whether the Company was taxable in respect of the latter sum for the assessment year 1938–39 and whether Ss. 4-A (*c*), 4 (1) (*b*) (ii) of the Income-tax Act 1922 were *intra vires* the Indian Legislature. The Privy Council answered both questions in the affirmative remarking that the derivation from British India of the major portion of its income for a year gave to that company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source that income may be derived. (*Per* Lord Uthwatt). In *Patiala State Bank* v. *Commissioner of Income-tax, Bombay*[4] the Patiala Bank did not carry on business in British India. It received through its agent in British India interest on certain Government of India securities it had purchased, and profit from the sale of these securities. It was held these receipts were liable to pay British Indian Income-tax under the Government Trading Taxation Act. 1926. In *Mohammed Mohy-ud-Din* v. *King-Emperor*[5] the Federal Court held that S. 41 of the Indian Army Act 1911 which purported to confer jurisdiction on a court martial to try non-British subjects for offences committed by them beyond British India was *intra vires* the Indian Legislature. S. 73 of the Charter Act of 1833 had not been repealed by S. 22 of the Indian Councils Act 1861.

(4) Power of Federal Legislature to legislate in an Emergency (S. 102):

The authors of the Canadian Constitution wanted the States to be mere local governments and so in the earlier cases there is a tendency to magnify the residuary powers conferred on the centre by S. 91 of the British North America Act 1867 to make laws " for

---

3. (1948) 2 M.L.J. 62 (P.C.).
4. (1944) F.L.J. 163 (P.C.).
5. (1946) 9 F.L.J. 64 (F.C.).

the peace, order, and good government of Canada " at the expense of state powers. In *Russell* v. *Queen*[6] a prohibition law of the dominion was upheld on the ground that it did not infringe " property and civil rights " which is a provincial item. Laws which wilfully make it an offence for a man to set fire to his own house thought they are in one sense laws affecting property are in reality laws concerning the public safety. In *Re Board of Commerce Act* 1919[7] a peacetime dominion law prohibiting certain retail dealers in cloth from charging as profit more than a certain percentage of cost was held invalid because it interfered with property and civil rights. Only some extraordinary peril to the national life of Canada like war can justify dominion invasion into the provincial sphere of legislation. In *In Re Regulation and Control of Aeronautics in Canada*[8] a dominion law providing for the regulation of flying operations in provinces was held *intra vires* by Lord Sankey, L.C. on the ground that when a matter has assumed such dimensions as to affect the body politic of Canada, dominion legislation on the matter is justified. The authority of *In Re Board of Commerce case* was confirmed in *Attorney-General for Canada* v. *Attorney-General of Ontario*.[9] The pendulum has now swung to the other side, since the decision of the Privy Council in *Attorney-General of Ontario* v. *Canada Temperance Federation*[10] holding that if the legislation goes beyond local or provincial concern and must from its inherent nature be the concern of the dominion as a whole, then it falls within the competence of the dominion Parliament as a matter affecting the peace, order, and good government of Canada.

S. 102 is based on the earlier Canadian cases like the *Board of Commerce case*[7] and restricts the interference of the Federal Legislature in provincial matters to grave emergencies like war. If the Governor-General in his discretion declares by proclamation that a grave emergency exists whereby the security of India is threatened whether by war or internal disturbance, the federal legislature shall have power to make laws with respect to matters in list 2, 7th Schedule. Bills under this section require the previous sanction of the Governor-General. In case of conflict between a federal law enacted by virtue of the provisions of this section and a Provincial law the former prevails. Proclamations have to be communicated to the Secretary of State for India laid before both Houses of Parliament and expire at the end of 6 months unless in the meantime Parliament approves of them by resolutions. Laws made by the Federal Legislature under this section expire six months after the proclamation ceases, except in respect of things already done. By the Government of India (Amendment) Act, 1939[11]

---

6. (1882) 7 App. Cas. 829. 7. (1922) 1 A.C. 191. 8. (1932) A.C. 54 (P.C.). 9. (1937) A.C. 326 (P.C.). 10. (1946) F.L.J. 50 (P.C.). 11. 2 & 3 Geo. VI, C. 66.

a proclamation of emergency may be declared before the actual occurrence of war or internal disturbance if the Governor-General is satisfied that there is imminent danger thereof. S. 126-A newly inserted by the Government of India Amendment Act, 1939[12] authorises the federation when a proclamation of emergency is in force to give directions to a province as to the manner in which it should exercise its executive authority. A federal law under S. 102 can confer powers and impose duties or authorise the conferring of powers and the imposition of duties on the Federation or officers and authorities of the Federation. Bills under the section require the previous sanction of the Governor-General. *Emperor* v. *Purushottam Devji*[13] holds that when the Federal Legislature legislates in respect of list 2 matters under S. 102 it is not bound by S. 297. The India and Burma (Emergency Provisions) Act, 1940 has enacted that the clause in the 9th Schedule (S. 72) laying down that the maximum life of an ordinance of a Governor-General is 6 months should be suspended during the War Emergency. The further question, arises, does such an ordinance expire six months after the emergency has ceased because of S. 102 (4)? It has been held in *Sridhar Achari* v. *Emperor*[14] that the revival of the clause in S. 72 does not have the effect of making such ordinances expire[15]. The India (Proclamations of Emergency) Act,

---

12. 2 & 3 Geo. VI, C. 66. 13. I.L.R. (1944) Bom. 429.
14. (1947) A.L.J. 661.

15. The declaration of the end of the period of emergency as 1-4-46 (by the Order in Council of 20-3-46) cannot have the effect of making ordinances promulgated by the Governor-General during the period when the original clause in S. 72 (limiting the duration of the Ordinance to not more than six months) of the Government of India Act was under suspension, of a limited duration. During the suspension of the clause all Ordinances were like Acts of the legislature and the restoration of the clause cannot affect the period of their validity—*Sridhar Achari* v. *Emperor* (1947) A.L.J. 661. Ordinances made by the Governor-General between 27-6-40 and 1-4-46 with respect to matters in Lists 1 and 3, 7th Schedule remain in force until repealed. Ordinances made with respect to matters in List 2 remain in force for 6 months after the revocation of the proclamation of emergency under S. 102—*Emperor* v. *Gas Plant Manufacturing Co.* (*Rampur*) *Ltd.*, A.I.R. (1947) Bom. 361. Ordinance 12 of 1946 which provides for the continuation of proceedings in respect of different offences under different rules and orders made under the Defence of India Act committed before 30-9-46 and instituted before that date, is *intra vires* the Governor-General. The law will continue to apply after the expiration of the period to things done or omitted to be done to which it applied before the expiration of that period. *In Re Thiagarajan Chettiar* (1947) 1 M.L.J. 98.

With respect it is submitted that the reasoning behind both decisions, that of Chandra, J. in *Sridhachari* v. *Emperor* (1947) A.L.J. 661 and that of the Federal Court in *Emperor* v. *Gas Manufacturing Plant Co., Ltd.*, A.I.R. (1947) F.C. 38 is somewhat artificial and far fetched. The former holds that ordinances promulgated by the Governor-General under S.72, Schedule IX of the 1935 Act are permanent just like Acts of the legislature and do not expire after the period specified in S. 3 of the India and Burma (Emergency Provisions) Act 1940 has expired. The latter decision on the other hand holds that such Ordinances in so far as they relate to matters

1945[16] has also invested the federal legislature with power to legislate on matters falling outside the 3 lists in the 7th Schedule when a proclamation of emergency under S. 102 is in force. The India (Central Government and Legislature) Act, 1946[17] continued the emergency powers of the Federal Legislature to legislate in respect of certain items in the Provincial list, like trade and commerce in and the production supply and distribution of cotton and woollen textiles, paper, foodstuffs, petroleum, spare parts of mechanically propelled vehicles, coal, iron, steel and mica, unemployment among ex-servicemen etc.

For the purposes of Ss. 107 (2) and 126 (2) the above matters are deemed to be included in part II of the concurrent list. These powers were to last only for one year after the proclamation of emergency ceased or if the Governor-General so directed 2 years from that date. Parliament could approve of the extension of this period for a period of 12 months subject to a maximum extension of 5 years. Laws made by the Indian Legislature under S. 102 do not completely cease to have effect after the revocation of the Proclamation of Emergency but cease to have effect only to the extent of the incompetency of the legislature to make the law, but for the issue of the Proclamation (The Proclamation of Emergency under S. 102 was revoked by Order in Council from 1-4-46).

---

in list 2, 7th schedule of the 1935 Act expire on 30-9-46 but as respects other matters the ordinances continue to have life even after the above date. It is submitted that S. 102 (4) has nothing to do with the question of the life of these ordinances and the India (Central Government & Legislature) Act 1946 has no relevance at all to the matter on hand. The Ordinance under S. 72, 9th schedule was only of limited duration (6 months) but it could be repeated any number of times. The suspension of the limitation of the period of six months as the life of these ordinances (during the period 27-6-40 to 30-9-46) effected by the India & Burma (Emergency Provisions) Act 1940 was designed only to obviate the necessity for the frequent repetition of the ordinance and there was no question of giving such ordinances the status of a permanent Act of the legislature, and still less was there any intention on the part of Parliament to discriminate between those parts of the ordinance which related to matters covered by items in lists 1 and 3 of the 7th schedule, and the other parts of the ordinance which dealt with items in list 2. The natural conclusion is that ordinances made by the Governor-General under S. 72, 9th schedule expire on 30-9-46 irrespective of the question whether they relate to matters in lists 1 and 3 of 7th schedule to the 1935 Act or to matters in list 2. Even though the legislative powers of the Governor-General are co-extensive with those of the federal legislature it would be going too far to dub ordinances of the Governor-General as Acts of the federal legislature which would attract the provisions of S. 102 (4) of the 1935 Act and of the India (Central Government & Legislature) Act 1946, S. 5. See S. 293 last para. ' In this section.....law,' which militates against the view that the term ' law ' includes ordinances in a context other than that section.

16. 9 & 10 Geo. VI, c. 23. 17. 9 & 10 Geo. VI, c. 39.

(5) Residuary Powers of Legislation (S. 104) :

By a process of judicial interpretation of the phrase " peace order and good government " occurring in S. 91 of the British North America Act, 1867 residuary powers have been vested in the dominion. In the U.S. and Australian Constitutions residuary power vests in the states. Under the 1935 Act the residuary powers can be distributed either to the centre or provinces by the Governor-General in his discretion. This novel procedure was necessitated by the cleavage between the Congress and the Muslim League during the Round Table Conference Proceedings which was the forerunner of the 1935 Act, the former wanting residuary powers to vest in the centre and the latter being equally insistent that it should go the units. The section is a compromise between these two extreme views. In *In re Powers of Federal Legislature to levy Estate Duty*[18] the Federal Court has held that the levy of estate duty is not a matter covered either by entry 56 of list 1 namely " Duties in respect of Succession to property other than Agricultural land " or by entry 43 of list 2 " Duties in respect of Succession to Agricultural land ". Kautilya in[19] has forcibly argued that the Federal Court's view is not quite correct. He says that because of S. 137 the power to impose duties in respect of succession to non-agricultural property is a power federal in name only, but provincial in its beneficial results and that explained the Government of India's reluctance to put a wide interpretation on item 56, list 1.[20] If it was held that the power to levy estate duty was a residuary power then it could be allotted to the centre which might monopolise the whole of the revenues likely to accrue as a result of the exercise of that power, getting over the provisions of S. 137 and entry 43, list 2, which were favourable to the provinces.

Entry 56 of list 1 corresponded to entry 52 of list 1 in the Joint Parliamentary Committee Report, which was taken from entry 50 of list 1 annexed to the White Paper which read " the imposition and administration of duties on property passing on death other than land ". " Duties in respect of succession to land " was in list 2. The Joint Parliamentary Committee did not intend to throw duties in respect of succession to non-agricultural property into the re-

---

18. (1944) F.L.J. 215 (F.C.). 19. (1944) F.L.J. 131 (Jour.).

20. "There is one feature common to both succession duty and estate duty namely that the occasion for the levy is the death of a person. But succession duty has reference to the acquisition of the property by the successor and generally takes into acccunt the extent of the benefit derived from him and other cor siderations rele vant from that point of view. The estate duty has reference to the value of the property constituting the estate of the deceased and is indepen lent of the question who takes it."

siduary field. As Sir Samuel Hoare said in Parliament on 27-3-35. "All that is likely to go into the residuary field are perhaps some quite unknown spheres of activity that neither my Honourable friend nor I can contemplate at this moment". By the Indian (Estate Duty) Act, 1945,[21] the power to levy estate duty in respect of non-agricultural property has been given to the centre by the addition of a new entry 56-A to list 1. The provinces have been given a similar power to levy estate duty in respect of agricultural property by the addition of new item 43-A to list 2. S. 137 applies to estate duty collected by the Federation.

(6) Power of Federal Legislature to implement Treaties (S. 106) :

This section which lays down that the Federal legislature shall not by virtue entry 3, list 1 have power to make laws for a province or federated state except with the consent of the Governor of the Province or the Ruler of the Federated State, corresponds to S. 132 of the British North America Act, 1867 which gives power to the Dominion Parliament to legislate for performing the obligations of Canada or of any province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries. It has been held in *In Re Regulation and Control of Radio Communications in Canada*[22] that S. 132 does not apply to treaties entered into by Canada separately and not as part of the British Empire.

(7) Restrictions on Legislative Powers (Ss. 108 and 110):

These restrictions have already been discussed in the opening section of this Chapter (p. 96 *ante*) In the old Government of India Acts there was a prohibition against the Indian Legislature enacting any laws which offended the unwritten laws of the United Kingdom whereon in any degree depended the allegiance of the subject to the Crown. In *Re Ameer Khan*[23] it was held that allegiance did not depend on protection and that a law which took away the subject's protection did not infringe the above rule. That clause has been omitted from latter Constitution Acts.

(8) Interpretation of Entries in Legislative lists of the 7th Schedule :

List 1, *Entries* 5 *and* 42:

The provisions of the High Denomination Bank Notes (Demonetisation) Ordinance 3 of 1946 are covered by items 5 and 42 of list 1 of 7th schedule of the 1935 Act and the ordinance is clearly *intra vires—P. K. Paul* v. *Emperor*, A.I.R. (1948) Cal. 205.

---

21. 8 & 9 Geo. VI, C. 7.
22. (1932) A.C. 304 (P.C.).
23. 6 Beng. L.R. 392, 408.

Entry 45, *list* 1 "*Excise*".

In *Re Central Provinces and Berar Sales of Motor Spirit and Lubricants' Taxation Act* 1938,[24] the Federal Court upheld the validity of a tax on the retail sales of motor spirits and lubricants imposed by a Provincial legislature. Such a tax was not in the nature of Excise which was entry 45 of list 1, but was only a Sales Tax which was entry 48, list 2, and hence the Provincial law was valid. In *Governor-in-Council* v. *Madras Province*[25] the Privy Council has held that a tax on first sales also is not excise provided the tax is on the sales and not on the goods. (See p. 17 *ante*.)

Entry 47, *list I* :

The Lahore Municipality imposed a cess or octroi duty on goods imported into Lahore including salt. It was contended that entry 49, list 2 should be read as "cesses on the entry of goods into a local area for consumption use or sale therein other than salt." because 'salt' was entry 47, list 1. This contention was accepted by the Federal Court in *Lahore Municipality* v. *Daulat Ram*.[26]

List 1, *entry* 58 *and list II, Entry* 49 :

Terminal taxes are chargeable at a railway or air terminus and must be referable to services (whether carriage or otherwise) rendered by some air or transport organisation. 'Cess' is a tax imposed on goods entering a particular area for consumption etc., therein. The contention that all taxes on rail or air borne goods must be imposed under entry 58, list 1 is untenable. Entry 49, list 2 is not confined to water-borne goods and railborne goods may be taxed both under entry 58, list 1 and entry 49, list II[27].

List 2, *Entry* 1 :

The U. P. Communal Disturbances Prevention Ordinance 3 of 1947, S. 10 punished any person who possessed unlicensed arms with imprisonment for not less than three years after an area had been declared to be a communally disturbed area. A Full Bench of the Allahabad High Court (Mootham, Raghubar Dayal, and Wanchoo, JJ.) in *Itwari* v. *Rex*, A.I.R. (1948) All. 369 (F.B.) has held that the pith and substance of the ordinance is the prevention of communal disturbances a matter which falls within Item 1 (Public Order) in List 2, 7th Schedule. It is therefore *intra vires* and not invalid because it incidentally encroaches upon the field reserved to the federal legislature namely Item 29, List 1, 7th Schedule 'Arms' (*Quaere :* Has not the test of incidental and substantial encroachment been repudiated by the Privy Council in *Prafulla Kumar* v. *Bank of Commerce*, 74 I.A. 23 and is it permissible to still apply that test ?).

---

24. A.I.R. (1939) F.C. 2. 25. (1945) F.L.J. 69 (P.C.). 26. A.I.R. (1942) F.C. 14. 27. *Punjab Flour Mills Ltd., Lahore* v. *Corporation of Lahore* (1947) 1 M.L.J. 265 (F.C.).

Entry 8, *list II* :

Where land vested in His Majesty for provincial purposes is situated outside a province e.g., in a Chief Commissioner's Province, the Provincial Legislature has no power to legislate in regard to it. The rights of the province over such land resemble those of a private owner.[28]

Entry 9, *list* 2 :

Requisitioning of land is not included in nor is it ancillary to the item of compulsory acquisition of land which is entry 9 of list 2. Nor is it included in entry 21 of list 2, " rights in or over land " which means, not personal rights, nor rights of temporary use and possession of the land, but rights whereby some interest is created in the land itself. The Central Legislature has no power to enact a provision with regard to the requisitioning of land as comprised in S. 2 (2) (*xxiv*) of the Defence of India Act and Rule 75-A of the Defence of India Rules, in the absence of a notification by the Governor-General under S. 104 (1) of the 1935 Act.[29]

Entry 21, *list II* :

The U.P. Remission of Rents Act is covered by entry 21, list II " land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents ". Authority to make laws regarding the collection of rents includes also authority to make laws regarding their remission.[30]

Entry 21, *list* 2 :

The right of a mortgagee in possession of agricultural land is also agricultural land and the rules of succession laid down in the Hindu Women's Right to Property Act 1937 do not apply to it.[31]

Entry 21, *list* 2 :

The U.P. Tenancy Act 1939 which cut down the absolute rights claimed by the Taluqdars to be comprised in their estates does not contravene S. 299 which prohibits the compulsory acquisition of land for public purposes without the payment of compensation. A law which regulates the relations between landlords and tenants and thereby diminishes the rights which the landlord had hitherto enjoyed does not offend S. 299. The Privy Council in *Thakur Jagannath Baksh Singh* v. *U. P.*[32] held that the prohibition contained in S. 299 did not affect the U. P. Tenancy Act, 1939, since it was not a confiscatory legislation. To regulate the relation between landlord and tenant and thereby diminish rights hitherto

---

28. *In re Allocation of Lands in Chief Commissioner's Provinces* (1943) 2 M.L.J. 137 (F.C.).
29. *Tan Bug Taim* v. *Collector of Bombay*, 47 Bom. L.R. 1010.
30. *United Provinces* v. *Atiqua Begum*, A.I.R. (1941) F.C. 16.
31. *M. P. Kaur* v. *V. M. U. Kaur* (1947) M.L.J. 127 (F.C.).
32. (1946) F.L.J. 88 (P.C.).

exercised by the landlord in connection with his land is different from compulsory acquisition of land. Two points were left open by P.C. (i) whether a suit under S. 42 lies against the Provincial Government for a declaration that a law is *ultra vires*. (ii) where a single judge's decision is appealable to a bench of the same High Court, whether a direct appeal to the Federal Court under S. 205 lies.

Entry 31, *list II*:

The Bihar Excise Amendment Act 1940 which gave power to the Government to prohibit the possession by any person or class of persons of intoxicating liquor is *intra vires* the Bihar legislature's powers because it is covered by entry 31, list II "Production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs". The cases which held that a power to regulate did not include a power to prohibit were not in point here since there was no regulation here.[33]

Entry 34, *list* 2:

The Madras Temple Entry Authorisation and Indemnity Act 1939 is covered by entry 34 of the Provincial list and is *intra vires* the Provincial legislature. Entry 34 cannot be given a restricted meaning as including only charities and charitable institutions other than religious institutions. The term "Charities" is a term of very wide legal significance in the law of England, Ireland, Scotland and British India. A power to legislate in respect of charities would clearly include the power to legislate in respect of charitable institutions and charitable endowments. The phrase "religious endowments" is only another illustration of the direction in which the general power of legislating in respect of "charities" may be exercised. "Charities" is an appropriate generic term of wide scope and meaning apt to include all secular, charitable and religious trusts and institutions recognised as such by British Indian Law. It could not have been the intention of Parliament to relegate legislation in respect of religious matters to the residuary field. Entries 33 and 34 of list 2 contradict such an assumption.[34]

Entry 42, *list II*.

The Bombay Finance Act 1932 which imposed an urban immoveable property tax based on the rental value of the property is in substance a tax on land and covered by entry 42, list II "taxes on lands and buildings, hearths and windows" and is *intra vires*. It is not a tax on income and does not relate to entry 54, list 1 which deals with taxes on income other than agricultural income.[35] The U.P. District Boards Act 1922, S. 108 imposed a tax on circumstances and property which was a composite tax consisting *inter alia* of profession tax which falls under entry 46, list 2. The argument

---

33. *Bhola Prasad* v. *Emperor*, A. I. R. (1942) F.C. 17.
34. *Manikka Sundara Bhattar* v. *R. S. Nayudu* (1946) F.L.J. 57 (F.C.).
35. *Sir Byramji Jeejeebhoy* v. *Province of Bombay*, I.L.R. (1940) Bom. 58.

that a tax falling under entry 42, list 2 is included in the tax falling under entry 46, list 2 cannot be accepted because those entries are distinct. So far as the tax on circumstances and property is referable to item 46 it cannot under the Profession Tax Limitation Act 1942, S. 2 exceed Rs. 50 per annum. So far as it is referable to item 42 it is not subject to any such restriction. *District Board Farukhabad* v. *Prag Dutt*, A.I.R. (1948) All. 382 (F.B.) (Malik, C.J., Raghubar Dayal and Basni Prasad, JJ.).

Entry 10 *of list* 3:

The Bihar Tenancy Act 8 of 1934 prohibited Zemindars of permanently settled estates from claiming more than 9/20ths of the produce as rent from their tenants. It was urged that this law related to a special form of contract because there were 3 parties to the contract *viz.*, Zemindars, Government and Tenant, and the Contract was in writing and so the law was within entry 10 of list 3 and because it conflicted with the existing Indian law *viz.*, Bihar Tenancy Act 1885 it was invalid under S. 107 (2) not having been reserved for the Governor-General's consideration, but this argument was rejected[36].

(9) Repugnancy between Provincial and Federal etc., Laws (S. 107) :

S. 107 (1) lays down that where a provincial law is repugnant to the provisions of a federal law or an existing Indian Law with respect to a matter in the concurrent list then the federal or existing Indian law prevails over the provincial law whether it has been passed before or after the latter. It should be noted that the section does not provide for repugnancy between provincial laws and existing Indian Laws with respect to matters in the exclusive federal list i.e., list 1. Perhaps as observed by Varadachariar, J. in *Subramania Chettiar* v. *Muthuswamy Gounden*[37] the omission was deliberate. Parliament thought that the chances of the provincial legislature trespassing into the field exclusively reserved for the federal legislature were so small as to be negligible " Federal law " means a law passed by the federal legislature i.e., the central legislature after 1-4-37 and "existing Indian law" means a law passed by the central legislature before 1-4-37. Sulaiman, J. in *Subramania Chettiar's case*[37] has expressed the opinion *obiter* that S. 107 (1) is not exhaustive of all types of repugnancy and that it would be unjust to apply the pith and substance rule borrowed from Canada without also applying the cognate rule of " occupied field ". Whenever the federal field is occupied by legislation any provincial legislation which comes into conflict with the former goes under notwithstanding that it does not come within the prohibitions contained in

---

36. *Hulas Narain* v. *Din Mohammad*, A.I.R. (1943) F.C. 9.
37. (1940) 3 F.L.J. 157.

the section. The Madras Agriculturists' Debt Relief Act 4 of 1938 is invalid because it is repugnant to the Negotiable Instruments Act 1881 an existing Indian Law. The other judges in *Subramania Chettiar's case* expressed no opinion on the doctrine of occupied field, because they held that on the facts of the case there was no repugnancy between the two laws.

Opinion has varied in Australia as to the test of repugnancy. The older view was that whenever it was physically impossible to obey both laws there was repugnancy. Suppose a federal law imposes a 48 hour week on employers and a state law imposes a 42 hour week. Both laws can be obeyed by obeying the state law and so it was said there was no repugnancy but the test laid down in later cases is different. Does one law make unlawful what was lawful under the prior law or does it take away any right given by the prior law? If it does, there is repugnancy. According to this reasoning there would be repugnancy between the federal and state laws in the above example relating to maximum working hours in a week. In *In Re Adhilakshmi Ammal*[38] the Madras Prohibition Act 1938 made the possession of even the smallest quantity of *ganja* punishable. The Madras Abkari Act did not punish the possession of *ganja* up to 5 tolas. The Madras High Court held that there was repugnancy between the two laws and that therefore the Prohibition Act was invalid to the extent of the repugnancy. This decision is open to the objection that it assumes that the Abkhari Act gave a right to every person to possess *ganja* up to 5 tolas and that the Prohibition Act took away that right. The Abkhari Act merely permitted possession of *ganja* up to the permissible limit and so there is no repugnancy between the two laws. S. 107 (2) lays down the method by which a provincial law with respect to a matter in the concurrent list can prevail over a federal or existing Indian law with respect to that matter. This can be done by reserving it for the consideration of the Governor-General or for the signification of His Majesty's pleasure and the Governor-General or His Majesty giving his assent to the law. Nevertheless the federal legislature may enact further legislation with respect to the same matter with the previous sanction of the Governor-General in his discretion. For repugnancy there need not be direct conflict between the two laws. Both laws may say don't in different ways. The true test is, has the dominant law expressly or impliedly evinced its intention to cover the field so as to render a subordinate law in the same field repugnant? The question in *Ahmed Khan* v. *Emperor*[39] was whether the Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance (Punjab) 2 of 1946 which applied to one district and the Frontier Crimes Regulation 1901 which applied to 6 districts, were repugnant and the Lahore High Court answered the question in the negative. See also the judgment

38. (1941) 4 F.L.J. 171 (H.C.). 39. A.I.R. (1948) Lah. 125.

of B. N. Rau, J. in *Stewart* v. *Brojendra Kishore*.[40] The India Provisional Constitution Order 1947 has omitted references in S. 107 to His Majesty.[41]

---

40. 184 I. C. 669.

41. The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in the proviso to S. 107 (2) omitted the words " either chamber of ".

To hold that two laws cannot be said to be repugnant to each other unless there is a direct conflict between them is to interpret the word ' repugnancy ' too narrowly—*Per* Rajadhyaksha and Gajendragadkar, JJ. in *Emperor* v. *Rustom Ardeshir*, 49 Bom. L.R. 821.

CHAPTER XI

ADMINISTRATIVE RELATIONS BETWEEN THE FEDERATION AND THE UNITS

(Sections 122–135)

(1) General: Ss. 122–128. S. 122 lays down that the executive authority of the provinces and the federated states shall be so exercised as to secure respect for the laws of the Federal legislature and existing Indian Laws. The executive authority of the federation shall be exercised with due regard to the interests of the provinces and the federated states. The White Paper proposed to give power to the Federation to issue directions to the provinces in regard to the administration in the latter of all federal laws whether with respect to matters in the Federal List or with respect to matters in the Concurrent List. The Joint Parliamentary Committee took a different view and thought it would be sufficient if the Federation was given power to give directions to a province in regard to the administration therein of federal laws with respect to matters in part II of the Concurrent List, which relate to social and economic subjects, like mines, factories, electricity, workmen's compensation, etc. Thus in India, executive authority with respect to matters in list 1 and part 2 of list 3, vests in the federation, and with respect to matters in list 2 and part 1 of list 3, in the provinces. In Canada with mutually exclusive lists the problem of executive authority presents no difficulty. In Australia, executive authority with respect to matters in the concurrent list vests in the States until the Commonwealth occupies the field by legislation. Under S. 123 the Governor-General can direct the Governor of a Province to perform agency functions for him in regard to defence, tribal areas, ecclesiastical affairs, or external affairs, the Governor acting in his discretion in performing such functions. The next two sections deal with the agency through which the executive authority of the Federation is exercised in provinces and in federated states. By S. 124, the Governor-General with the consent of the Provincial Government, or the Ruler of the Federated State, can constitute the latter as his agent for the administration of federal laws relating to matters other than those mentioned in S. 123. A federal law may confer powers and impose duties upon a province or its officers, or upon a federated state or its officers, designated for the purpose by the Ruler. The words " or authorise the conferring of powers and the imposition of duties " were added in S. 124 after the words " confer powers and impose duties " by the Government

of India (Amendment) Act, 1939[42]. The extra cost of administration incurred by a province or federated state under S. 123 has to be paid by the Federation to the Province or Federated State as the case might be. The sum may be an agreed sum, or in default of agreement, it is to be determined by an arbitrator appointed by the Chief Justice of India. Two differences between the executive authority of the Federation in provinces, and in the Federated States, may be noted. (i) Mere legislative competence does not give the Federation executive authority in the Federated State and it must actually enact a law applicable to the State covered by the list of subjects mentioned in the Instrument of Accession executed by the State in order to get such executive authority. In the case of a province, the executive authority of the Federation arises by reason of legislative competence irrespective of the fact whether it has actually exercised its powers or not. (ii) Where federal laws impose duties on Provincial Officers they need not be designated by the Provincial Government. Where they impose duties on officers in Federated States such officers have to be designated by the Ruler of the State. By S. 125 agreements may be made between the Governor-General and the Ruler of a Federated State for the administration therein of any Federal law applicable thereto. The Governor-General can also satisfy himself whether the law is carried out in accordance with the policy of the Federal Government. If he is not so satisfied, the Governor-General acting in his discretion may issue such directions to the Ruler as he thinks fit. Courts shall take judicial notice of agreements under this section. The state is not entitled to be reimbursed by the Federation for the expenses of administering such federal laws. Federal laws applicable to a Federated State may be administered in either of 3 ways. (i) Directly by Federal officers stationed therein. (ii) Through State Officers designated by the Ruler and with his consent, the expenses of such administration being borne by the federation.[43] (iii) Through State Officers under an agreement between the Federation and the Ruler of the State, the expenses of administration being borne by the State.[44] S. 126 deals with the control of the Federation over the provinces in certain cases. By sub-section (1), the Federation (that is the Governor-General acting with Ministers) can give directions to the Province in regard to matters in list 1 to ensure that the executive authority of the Province does not impede or prejudice the executive authority of the Federation. By sub-section (2) an Act of the Federal legislature introduced with the previous sanction of the Governor-General can provide for the giving of directions to the Provinces in regard to the exercise of executive authority as respects matters in part 2 of list 3. By sub-section (3) the executive authority of the Federa-

---

42. 2 & 3 Geo. VI, C. 66. 43. S. 124. 44. S. 125.

tion extends also to the giving of directions to the Provinces in regard to the construction and maintenance of means of communication of military importance. Sub-section (4) deals with a case where effect is not given to directions issued under the section ; in such a case the Governor-General can issue the directions as orders either in the same form or with modifications. The last sub-section (5) gives the Governor-General, acting in his discretion, power to issue orders to a Provincial Governor as to the manner in which the executive authority of the Province is to be carried out to prevent any grave menace, to the peace and tranquillity of India. Under sub-section (1) the directions can be given through executive orders ; under sub-section (2) they have to take the form of legislation. Sub-section (1) has reference to a law pertaining to matters in list 1.; sub-section (2) deals with laws with respect to items in part 2 of list 3. For a case where it was held that executive power can go beyond legislative power, see *Attorney-General for Victoria* v. *The Commonwealth*[45] where the validity of the action of the Commonwealth Government in maintaining a clothing department which not merely supplied clothing for defence forces but also for certain state employees and private persons was upheld. As to amendments to S. 126 made by the Government of India (Amendment) Act, 1939[46] (see p. 22 *ante*). By S. 127, the Federation may require a province to acquire land situated in it on its behalf or to transfer land belonging to the province on agreed terms, or in default of agreement, on such terms as may be determined by an arbitrator appointed by the Chief Justice of India. As regards such land both the Federal and the Provincial Legislature have concurrent powers of legislation by virtue of entry 10, list 1. S. 128 provides that the executive authority of a Federated State shall not be exercised in such a manner as to prejudice or impede the exercise of the executive authority of the Federation exercisable by virtue of a federal law applicable to the State. If the Ruler of the State fails to fulfil the obligations under the section, the Governor-General in his discretion may give such directions to him as he thinks fit after hearing his representations. Questions as to whether the executive authority of the Federation is exercisable in the State shall be determined by the Federal Court in the exercise of its original jurisdiction either at the instance of the Federation or the Ruler of the State.

(2) Broadcasting (S. 129) :

While the 1935 Bill was in Parliament, a suggestion was made that certain kinds of broadcasting should be undertaken by the Federation while others should be left to the provinces, but this suggestion has not been accepted. Though broadcasting is a federal subject the Federal Government cannot unreasonably

---

45. (1935) 52 C.L.R. 533. 46. 2 & 3 Geo. VI, C. 66.

refuse to entrust to a province or a Ruler of a Federated State, such functions with respect to broadcasting like construction and use of transmitters, regulation and imposition of fees with respect to the construction and use of transmitters etc. But the provinces etc., are not to be entrusted with functions in relation to transmitters constructed by or by the authority of the Federal Government. The entrusting of such functions to the Ruler or the province may be made subject to conditions imposed by the Federal Government, including conditions with respect to finance, but conditions with respect to matter broadcast by Federated States cannot be imposed. Federal laws shall give due effect to the provisions of S. 129. Questions relating to the lawfulness of the conditions imposed under the section and the reasonableness of the Federal Government's refusal to entrust functions shall be determined by the Governor-General in his discretion. The Governor-General's responsibility for the prevention of any grave menace to the peace or tranquillity of India and his power to regulate matter broadcast, to discharge his discretionary and individual judgment functions, are not affected by the section.

(3) Interference with Water Supplies (Ss. 130–134):

The White Paper proposed to give exclusive legislative power to the provinces in regard to water supplies but the Joint Parliamentary Committee thought that disputes between provinces regarding water might not always involve a justiciable right, and that therefore, it was proper that such disputes should be taken to the Governor-General who might appoint a tribunal to investigate them. Ss. 130 and 131 deal with complaints by Governors' Provinces or Federated States, while S. 132 deals with similar complaints by Chief Commissioner's Provinces. S. 133 excludes the jurisdiction of the Federal Court, while S. 134 enables Federated States by agreement to exclude the application of Ss. 130 and 131. If it appears to a Provincial Government or the Ruler of a Federated State that the rights of the Province etc., in regard to natural sources of water supply in any province etc., are likely to be prejudiced by executive or legislative action, the provincial Government or Ruler may complain to the Governor-General. If the Governor-General thinks that the issues are of sufficient importance he shall appoint a Commission consisting of persons having special knowledge and experience of law, finance, irrigation, engineering, administration, to investigate and report to him matters to which the complaint relates. For the purpose of assisting the Commission the Federal Court, on the Commission's request, may make orders and issue Letters of Request (S. 211). After considering the report of the Commission, the Governor-General shall give his decision unless in the meanwhile he is requested by the Province or State to refer the dispute to His Majesty in Council, in which case he has to refer it to His Majesty in Council, who may give

such decision and make such order as he deems proper. Acts of a province or state, repugnant to orders made by His Majesty in Council and by the Governor-General under this section, shall be void to the extent of the repugnancy. The Governor-General may vary his orders, under the Section, and if so requested he can refer the matter again to His Majesty in Council, and His Majesty in Council may vary the decision or order. An order by the Governor-General or His Majesty in Council under the section shall direct by whom the costs of the Commission shall be paid. Disputes under Ss. 130 to 132 cannot be taken to the Federal Court or any other Court. S. 134 gives Princes liberty to contract out of the provisions of Ss. 130 and 131, and is based on their memorandum of 27-2-35.

(4) Inter-Provincial Council (S. 135) :

If on representations made to him by the Governor-General, His Majesty thinks that public interests will be served by the establishment of an Inter-Provincial Council he may establish such Council by order in Council. The duties of the Council shall be to inquire into and advise upon disputes between the Provinces, investigate subjects of common interest between the provinces, and make recommendations with respect to the co-ordination of policies by various provinces in regard to any particular subject. Provision may also be made by order in Counil for the representation of Indian States on the Council. Under the 1919 Act inter-provincial disputes were settled by the Governor-General in Council. Obviously this procedure after 1937 is incompatible with the new status conferred on the provinces. Hence the Joint Parliamentary Committee thought that some kind of Inter-Provincial Council was necessary but that it would not be desirable to fix the constitution of the Council by statutory provisions in the Constitution Act itself.[47]

---

47. *Amendments in Ss.* 122 *to* 135.—The India Provisional Constitution Order 1947 has omitted S. 123 and in S. 126 sub-section (2) proviso omitted the words 'either chamber of'. S. 126 (4) has been omitted and in S. 126 (5) for the words from 'without prejudice' to 'Governor of' the following words have been substituted. 'The executive authority of the Dominion shall also extend to the giving of directions to.' In S. 126-A para. (*a*) all words after 'exercised' have been omitted. In S. 129 (4) for 'The Governor-General in his discretion' 'an arbitrator appointed by the Chief Justice of India' has been substituted. In S. 129 (5) all words after 'any part thereof' have been omitted. In S. 131 the provisos to sub-sections (5) and (7), the words 'His Majesty in Council or', and sub-section (9), have been omitted. In S. 134 for 'the Ruler whereof' 'unless the Ruler thereof' has been substituted and for 'are not to apply' 'are to apply' has been substituted. In S. 135 the words 'His Majesty upon consideration of representations addressed to him by' have been omitted and the words 'Governor-General' have been substituted for 'His Majesty in Council.'

CHAPTER XII

DISTRIBUTION OF REVENUES, PROPERTY, CONTRACT AND SUITS

(Sections 136—180)

(1) Distribution of Revenues between the Federation and the Units:

(*a*) *History:* In the earliest period by the Parliamentary Acts of 1853 and 1858 the Government of India was the custodian of all public revenues. Then came Lord Mayo's decentralisation scheme of 1871 which made over the receipts from certain departments like police, jails, etc., to the provinces. Lord Lytton in 1877 carried this decentralisation a bit further and divided the revenues of India into three categories—imperial, provincial, and divided, the last being shared by both the Centre and the Provinces. Salt and Customs revenue went to the Centre exclusively and this scheme was subject to a quinquennial revision. Under the 1919 Act the Centre was given the revenue derived from customs, salt, income-tax, and non-judicial stamps. To make up for the deficit in the Central Budget even after the above sources of revenue had been allotted to the Centre, contributions were levied from the provinces.

Under the 1935 Act the sources of exclusive federal revenue are : (i) Surcharges on the following duties: in respect of succession to non-agricultural land, stamp duties mentioned in List 1, terminal taxes on goods or passengers carried by railway or air, taxes on railway fares and freights. (S. 137, proviso).[48] (ii) Salt, excise, and export duties until an Act of the federal legislature otherwise provides [S. 140 (1)]. (iii) Taxes mentioned in Ss. 137, 138 so far as they are attributable to Chief Commissioners' provinces. (iv) Surcharge on income-tax [S. 138 (1) (*b*)].

The following revenues are exclusively State or Provincial in character :—(i) Duties in respect of succession to non-agricultural land, stamp duties mentioned in List 1, terminal taxes on goods or passengers carried by railway or air, and taxes on railway fares and freights (S. 137). (ii) Salt, excise and export duties if an Act of the federal legislature assigns these revenues to the provinces [S. 140 (1)]. (iii) One half or a greater proportion of export duty on jute shall be assigned to the jute growing provinces and states

---

48. S. 137.—The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in the proviso to S. 137 substituted the words "Dominion purposes" for the words "federal purposes."

in proportion to the respective amounts of jute grown therein [S. 140 (2)].

Common Source of Revenue to both the Federation and Provinces and Federated States : Non-agricultural income-tax (S. 138).

(*b*) *Taxes on Non-agricultural Income* (*S.* 138) : [49] S.138 deals with

---

49. *Amendments in S.* 138 : The India Provisional Constitution Order 1947 has in S. 138 substituted the word ' Dominion ' for the word ' federal ' and the words ' Order of the Governor-General ' for the words ' subsequent Order in Council '. In S. 138 (1) for the words ' one per cent or such other ' the word ' such ' has been substituted. In S. 138 (4) the words ' Order of the Governor-General ' have been substituted for the words ' His Majesty in Council ' and the words ' or of the Federal Railway Authority ' have been omitted.

Ss. 138, 140, 142.—The Government of India (Distribution of Revenues) Order 1948 (Gazette of India Extraordinary 17-3-48) has made the following amendments to the Distribution of Revenues Order 1936 : (i) Paras. 5, 8 and 9 of the Distribution of Revenues Order are inoperative. (ii) For the purposes of S. 138 (i) one per cent of so much of the net proceeds of income-tax as does not represent the net proceeds of taxes payable in respect of Dominion emoluments shall be deemed to represent proceeds attributable to the Chief Commissioners' provinces in the year ending 31-3-48 and in the year ending 31-3-49. (iii) The percentage to be assigned to the Governor's provinces in each of the said years shall be 50 per cent. (iv) The sums falling to be distributed among the Governors' provinces in each of the said years shall be distributed as follows : Madras 18 per cent, Bombay 21 per cent, West Bengal 12 per cent, United Provinces 19 per cent, East Punjab 5 per cent, Bihar 13 per cent, Central Provinces 6 per cent, Assam 3 per cent, Orissa 3 per cent. (v) The porportion of the net proceeds of export duty on jute to be assigned under S. 140 (2) to the provinces in which jute is grown shall be 20 per cent. (vi) There shall be charged on the revenues of the Dominion as grants in aid of the revenues of the Provinces of Assam and Orissa (*a*) the sums of Rs. 18,75,000 and Rs. 25,00,000 respectively in the year ending 31-3-48, (*b*) Rs. 30,00,000 and Rs. 40,00,000 respectively in the year ending 31-3-49.

Text of S. 138 :

(1) Taxes on income other than agricultural income shall be levied and collected by the federation but a prescribed percentage of the net proceeds in any financial year of any such tax except in so far as those proceeds represent proceeds attributable to Chief Commissioners' Provinces or to taxes payable in respect of federal emoluments, shall not form part of the revenues of the federation but shall be assigned to the provinces and to the federated states, if any, within which that tax is leviable in that year and shall be distributed among the provinces and those states in such manner as may be prescribed :

Provided that (*a*) the percentage originally prescribed under this sub-section shall not be increased by any subsequent Order in Council ; (*b*) the federal legislature may at any time increase the said taxes by a surcharge for federal purposes and the whole proceeds of any such surcharge shall form part of the revenues of the federation.

(2) Notwithstanding anything in the preceding sub-section the federation may retain out of the moneys assigned by that sub-section to provinces and states—(*a*) in each year of a prescribed period such sum as may be prescribed ; and (*b*) in each year of a further prescribed period a sum less than that retained in the preceding year by an amount being the same amount in each year so calculated that the sum to be retained in the last year of the period will be equal to the amount of each such annual reduction. Provided that (i) neither of the periods originally prescribed shall be reduced by any subsequent Order in Council ; (ii) the Governor-General in his discretion may in any year of the second prescribed period direct that the sum to be

the important topic of sharing of income-tax revenue by the federation and the provinces and the federated states. The White Paper proposed that a percentage of income-tax not less than 50 and not more than 75 should be assigned to the provinces. The sum to be retained by the federation out of the sum thus assigned to the provinces would be constant for the first three years and would thereafter be reduced gradually over a further period of seven years, power being given to the Governor-General to suspend these reductions if circumstances made it necessary so to do. The Joint Parliamentary Committee thought that it would be inadvisable to fix the periods in the Act itself and that it would be preferable to leave them to be fixed by Order in Council. "For sometime to come the Centre is unlikely to be able to do much more than find the funds necessary for the deficit provinces ; and an early distribution of any substantial part of the taxes on income is improbable. We think that it would be preferable to leave the actual periods indicated above, which the White Paper proposed should be 3 and 7 years, to be determined by Order in Council in the light of the circumstances at the time rather than fix them by statute." This view is found embodied in S. 138. The Distribution of Revenues Order 1936 (based on the recommendations of the Committee under the chairmanship of Sir Otto Niemeyer which was appointed to investigate and fix the prescribed periods under S. 138) has fixed the percentage to be distributed among the provinces as follows : Madras 15, Bombay 20, Bengal 20, United Provinces 15, Punjab 8, Bihar 10, Central Provinces 5, Assam 2, Frontier Province 1, Orissa 2, Sind 2. The percentage to be retained by the federation was fixed at 50. The first prescribed period was 5 years from 1-4-37 and the sum to be retained by the federation was either the whole of the moneys assigned to the provinces or such sum thereof as together with the federation's share of the

---

retained by the federation in that year shall be the sum retained in the preceding year and that the second prescribed period shall be correspondingly extended but he shall not give any such direction except after consultation with such representatives of federal, provincial, and state interests as he may think desirable nor shall he give any such direction unless he is satisfied that the maintenance of the financial stability of the federal Government requires him so to do.

(3) Where an Act of the Federal Legislature imposes a surcharge for federal purposes under this section the Act shall provide for payment by each federated state in which taxes on income are leviable by the federation of a contribution to the revenues of the federation assessed on such basis as may be prescribed with a view to securing that the contribution shall be the equivalent as near as may be of the net proceeds which it is estimated would result from the surcharge if it were leviable in that state and the state shall become liable to pay that contribution accordingly.

(4) In this section 'taxes on income' does not include a corporation tax ; 'prescribed' means prescribed by His Majesty in Council ; and 'federal emoluments' includes all emoluments and pension payable out of the revenues of the federation or of the Federal Railway Authority in respect of which income-tax is chargeable.

divisible net proceeds of the tax on income and the sum payable to the general revenues of the federation out of the net receipts of railways amounted to 13 crores of rupees, whichever was less. Suppose the federation's share of the divisible net proceeds of income-tax in any financial year is 6 crores (the total income-tax proceeds for that year being 12 crores) ; suppose the contribution to the general revenues from railway receipts is 4 crores. The federation can retain 3 crores (13 minus 6 minus 4) out of the proceeds of income-tax assigned to the provinces. The second prescribed period under the section has been fixed by the Distribution of Revenues Order 1936 as 5 years from the expiration of the first period. By the Distribution of Revenues Amendment Order 1942 in paragraph 6 (1) of the original Order after the words 'retained by the federation under that sub-section' the following was substituted : 'Shall be (i) in the first and second of those years.' A new clause (ii) was added as follows : 'and (ii) in the third, fourth, and fifth of those years, four and half crores of rupees.'

The India and Burma (Miscellaneous Amendments) Act 1940 (3 & 4 Geo. VI, C. 5) added the following words after the words 'in such manner as may be prescribed' in S. 138 (1) : 'For the purposes of this sub-section in each financial year one percent or such other percentage as may be prescribed of so much of the net proceeds of the tax on income as does not represent the net proceeds of taxes payable in respect of federal emoluments shall be deemed to represent proceeds attributable to the Chief Commissioners' provinces.' In S. 138 (2) (*a*) after the words 'as may be prescribed' the following words were added : 'Or if it is so prescribed the whole of those moneys.' It was also made clear by this Amending Act that income-tax also included a tax in the nature of excess profits tax.

(*c*) *Miscellaneous Financial Provisions* (*Ss.* 139 *to* 144 and 150 *to* 160) : By S. 139 Corporation tax (Supertax on Companies) shall not be levied by the federation in a federated state until 10 years after the establishment of the federation. Federal laws levying such tax shall give to the Rulers of such states the option of paying to the revenues of the federation a contribution based on the amount which would have resulted from the tax if it were levied in the state and claiming exemption from the levy of such tax by the federation in such state on the payment of such contribution. Where the Ruler elects to do so he shall supply to the Auditor-General of India such information as may enable him to determine the amount of such contribution. If the Ruler of the State is dissatisfied with the amount determined by the Auditor-General he shall apply to the Federal Court and have the amount reduced and no appeal shall lie from the decision of the Court on such appeal. The India and Burma (Miscellaneous Amendments) Act 1940 (3 & 4 Geo. VI, C. 5) has amplified the meaning of the term 'Corporation tax' as meaning a tax which is not chargeable in

respect of agricultural income and in respect of which companies cannot deduct the tax paid by them from the dividends payable by them to individuals etc. S. 140 lays down that salt, excise, and export duties shall be federal sources of revenue until a federal law provides otherwise. The Distribution of Revenues Order 1936 has laid down that 62½% of the export duty on jute should be assigned to the jute growing provinces of Bengal, Bihar, Assam, and Orissa. By S. 141 bills which vary taxes in which the provinces are interested or which vary the meaning of the expression 'agricultural income' or which effect the above principle of distribution of revenues or which impose a federal surcharge require the previous sanction of the Governor-General. S. 142 deals with grants to deficit provinces by the federation. The Distribution of Revenues Order 1936 has fixed these grants as follows: United Provinces 25 lakhs during 1937–42; Assam 30 lakhs each year; Frontier Province 100 lakhs each year; Orissa 47 lakhs during 1937–38, 43 lakhs in 1938–42, and 40 lakhs subsequently. Sind 110 lakhs in 1937–38, 105 lakhs in 1938–47, 80 lakhs in 1947–67, 65 lakhs in 1967–72, 60 lakhs in 1972–77 and 55 lakhs in 1977–82. Under the Distribution of Revenues (Amendment) Order 1944 Sind has been allowed to capitalise the annual grant in aid of Rs. 105 lakhs due to it till 1982 and set it off against her liability to repay loans in respect of the Sukkur Barrage Scheme and pay the balance. (See Order in Council dated 23rd March 1944, About 1930 a Committee of Experts called the Federal Grants Commission was appointed under S. 96 of the Australian-Constitution Act to hear applications for financial assistance from South Australia, Western Australia and Tasmania. As to this topic See "*Future of Australian Federalism*" by Gordon Greenwood (1946). Prof. Bailey is of the view that S. 96 is the "mechanism of Commonwealth supremacy." By S. 143 taxes, duties, cesses etc., which were levied by a provincial government, municipality etc., before 1st January 1935 can continue to be levied by them after 1st April 1937 until a federal law provides otherwise, notwithstanding that these taxes are mentioned in the federal list. Tax on income from property called by the name of tax on circumstances and property validly levied by the U.P. Government under the U.P. District Boards Act in 1922 and in force on 1–1–35 is valid—*District Board, Farukhabad* v. *Prag Dutt*, A.I.R. (1948) All. 382 (F.B.) (Malik, C.J., Raghubar Dayal and Basni Prasad, JJ.). By the India and Burma Transitory Provisions Order 1937, for a period of two years from 1st April, 1937 references in S. 143 to 1st April 1935 shall be read as references to 1st January, 1937. The effect is that if a municipality had levied a tax before 1st January 1937 it could continue to levy it and apply it for municipal purposes until 1st April 1939, even though the tax after 1st April 1937 became a federal tax. The Federal Court in *United Provinces* v. *Governor-General*, A.I.R. (1939) F.C. 58 held that as a result of the combined effect of the above Order and of

the Adaptation of Indian Laws Order 1937, fines levied by Courts in cantonment areas would not be credited to provincial revenues for two years from 1st April 1937, even though from 1st April 1937 Courts in cantonments and fees levied therein had become provincial subjects. Some objections had been raised to the employment tax or profession tax on the ground that it amounted to a tax on income and hence was not within the legislative competence of provincial legislatures. To remove this doubt and objection the India and Burma (Miscellaneous Amendments) Act 1940 (3 & 4 Geo. V, C. 5) has added a new S. 142-A which lays down that no provincial law relating to profession tax, callings tax, trades tax, or employment tax shall be invalid on the ground that it relates to a tax on income. But after 31st March 1939 the total amount payable in respect of any one person by way of the above taxes shall not exceed fifty rupees per annum. Provided that if a municipality, local board, etc., had before that date been levying the tax at a higher rate it would be allowed to continue to do so unless a federal law made provision to the contrary. The Indian Professions Tax Limitation Act, 1941 has fixed 50 Rupees as the maximum amount of profession tax payable by any person in a year. The following enactments have been saved by the above Act : Chapter XII of the Calcutta Municipal Act, 1923 ; S. 123 (1) (*f*) of the Bengal Municipal Act 1932 ; S. 128 (1) (ii) of the United Provinces Municipalities Act 1916 and S. 66 (1) (*b*) of the Central Provinces Municipalities Act 1922.

S. 144 deals with the method of calculating the net proceeds of any tax and the manner in which contributions by states etc., are to be calculated. S. 150 lays down that the revenues of the federation and the provinces shall be used only for the purposes of India (which includes Indian states whether federated or not and also tribal areas). S. 151 lays down that all public moneys should be paid into the treasury of the federation or the province as the case may be, subject to obvious exceptions like the Post Office. Under S. 152 in appointing whether permanently or temporarily the Governor or the Deputy Governor of the Reserve Bank, fixing the terms of their office and in superseding the Central Board of the Bank and in liquidating it, the Governor-General shall act in his discretion. In nominating and removing from office directors of the Reserve Bank, the Governor-General exercises his individual judgment. The object of the section is to keep currency and exchange above politics. The Joint Parliamentary Committee was of the view that even in nominating directors of the Bank the Governor-General should act in his discretion but this suggestion has not been incorporated into the Act. By S. 153 bills which affect coinage, currency or the constitution or functions of the Reserve Bank require the previous sanction of the Governor-General in his discretion. Under the White Paper the section did not cover the constitution of the Reserve Bank and this change was

introduced by the Joint Parliamentary Committee. Sections 154 and 155 deal with the topic of the exemption of federal property from provincial and state taxation and the exemption of provincial and state property from federal taxation. Under S. 154 property vested in His Majesty for federal purposes is exempted from taxation by or by any authority within a province or a federated state. A federal law may make the above property liable to provincial or state taxation. Where there was any liability to pay such a tax before 1-4-37 such liability shall continue until a federal law provides otherwise. Under S. 155 the Government of a Province and the Ruler of a federated state are exempt from federal taxation in respect of lands or buildings situated in British India or income accruing or received in British India. Provided that where a trade or business is carried on by a Provincial Government in British India outside the province, or by the Ruler in any part of British India, the exemption does not apply, and the Ruler is not exempted from federal taxation in respect of his personal property or his personal income. Exemption from taxation enjoyed by Rulers of States in respect of Indian Government securities issued before 2-8-35 are not affected by the section. The following differences between the two Ss. 154 and 155, may be noted: (i) The former section applies to all kinds of property whether immovable or movable including debts and actionable claims. The latter section is confined in its operation to immovable property. (ii) The exemption granted by S. 154 to federal property can be taken away by the federal legislature. The provincial legislature has not got a similar power under S. 155. (iii) S. 154 continues taxation in respect of federal property which was in force before 1-4-37. S. 155 does not contain any analagous provision. (iv) S. 154 does not contain any exception withdrawing trade or business carried on by the federal Government from the operation of the section while S. 155 makes a provincial Government carrying on such trade or business subject to federal taxation. (v) Under S. 154 federal property is also exempted from taxes imposed by any authority within a province or federated state, e.g., municipality or district board. There is no similar provision in S. 155 and hence possibly lands and buildings belonging to a province might be liable to pay taxes imposed, say, by a municipality in a Chief Commissioner's province. It should be noted that S. 155 (2) applies to Rulers of non-federated states also. While under S. 154 the property has to be vested in His Majesty for federal purposes there is no similar qualification in S. 155. Even property situated in a province for Crown Representative purposes can claim the exemption granted by S. 155. S. 154-A which has been newly inserted by the India and Burma (Miscellaneous Amendments) Act 1940 (3 & 4 Geo. VI, C. 5) prohibits provincial laws and laws of federated states from imposing or authorising the imposition of a tax on the consumption or sale of electricity consumed by or sold to the

Federal Government or consumed by the Federal Railway Authority in the construction, maintenance, or operation of a federal railway or sold to the Authority for consumption in such construction, maintenance etc. The bar laid down by the section can be removed by a federal law subject to the condition that the law shall secure that the price of the electricity sold to the Government or the Authority as the case may be shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity. S. 156 deals with the expenses of a Court or commission or the pension payable to a servant of the Crown in India which is charged on the revenues of the federation or of the province. In the former case if the Court etc., has served any of the separate needs of a province or the servant has served in the province, the province will have to make a contribution towards those expenses or pension as the case may be. In the latter case if the Court etc., has served the separate needs of the federation or of another province, or if the servant has served the federation or another province, the federation or the other province will have to make a contribution towards those expenses or pension. The contribution is a charge on the revenues of the province or of the federation or of the other province and may be agreed upon, and in default of agreement shall be determined by an arbitrator to be appointed by the Chief Justice of India. S. 157 lays an obligation on the Federation and the Provinces to furnish the Secretary of State for India with sufficient funds to meet the liabilities which fall to be met out of the revenues of the Federation or of the Province as the case may be, and in particular to enable payment of pensions payable in the United Kingdom by the Secretary of State for India and the High Commissioner. By S. 158 power is given to His Majesty in Council to make provision for giving effect to arrangements with respect to the monetary relations etc., made before 1-4-37 between the Governor of Burma in Council and the Governor-General in Council and for defining and regulating the relations between the monetary systems of the two countries. The section is intended to meet the situation arising out of the nonfunctioning of the Reserve Bank of India in Burma consequent on its separation. The original clause related only to the giving effect to the arrangements but the clause now in the Act is wider and covers also financial adjustments consequent on such arrangements. Sums required to be paid under this section may be required by Order in Council to be paid out of the revenues of the federation and shall be charged on the revenues of the federation. This section has created the fund out of which Burma will have to be paid when she has cleared off her share of India's general debt and pension liabilities which she has assumed, and is on the credit side. See the India and Burma (Burma Monetary Arrangements) Order 1937 and the Government of Burma (Miscellaneous Financial Provisions) Order 1937 made on the recommendations of the Amery Tribunal.

S. 159 empowers His Majesty in Council to give relief in respect of tax on income taxable both in India and Burma. S. 160 enables His Majesty by Order in Council to give directions with respect to the duties which are to be levied on goods imported into or exported from India or Burma with a view to preventing the undue disturbance of trade between India and Burma in the period immediately following the latter's separation. By the India and Burma Trade Regulation Order 1937 import and export duties between the two countries remain as they were before. The Order was to remain in force for three years and could be terminated on the Governor-General of India or the Governor of Burma giving one year's notice thereafter.[50]

(*d*) *Borrowing* (*Ss.* 161 *to* 165): S. 161 lays down that after 1-4-37 the power of the Secretary of State in Council to borrow on the security of the revenues of India shall cease. But during the transitional period, i.e., from 1-4-37 until the establishment of the federation, under S. 315 the Secretary of State has power to contract sterling loans on behalf of the Governor-General in Council within the limits prescribed by the East India Loans Act. S. 162 empowers the federation to borrow on the security of the revenues of the federation and to give guarantees, within such limits as may be prescribed by a federal law. A similar power to borrow

---

50 *Amendments in Ss.* 139 *to* 144 *and* 150 *to* 160: S. 139 has been omitted by the India Provisional Constitution Order 1947 which has also in S. 140 (2) substituted the words 'such proportion as the Governor-General may determine' for the words 'one half or such greater proportion as His Majesty in Council may determine.' Ss 157 to 160 have been omitted.

In S. 142 for "His Majesty in Council" substitute "Order of the Governor-General" for "His Majesty" substitute "the Governor-General," and omit the proviso.

In S. 143 after sub-section (1) insert.—"(1-A) Nothing in the foregoing provisions of this Chapter authorizes the levy of any duty or tax by the Dominion in any acceding State unless provision in that behalf is made in the Instrument of Accession of that State."

S. 150 for "India" substitute "the Dominion."

S. 151 omit sub-section (2).

S. 152 omit.

S. 153 omit "either Chamber of."

S. 154-A omit "the Federal Railway Authority or" and "that authority or."

S. 155 in sub-section (1), for "British India" substitute "India."

S. 141. The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 141 (1) omitted the words "either chamber of."

S. 150. The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 150 (2) substituted the words "dominion legislature" for the words "federal legislature."

S. 154. Additional buildings raised on Central Government land after 31-3-37 are exempt under S. 154 from assessment under the Municipal Act while lands and buildings as they existed on 31-3-37 continue to be liable to assessment under the proviso to the section *Governor-General in Council v. Corporation of Calcutta*, 52 C.W.N. 173.

on the security of the revenues of the province and to give guarantees is conferred on a province by S. 163 (1).

Under S. 163 (2) the federation may make loans to, or give guarantees in respect of loans raised by, a province. Where a province borrows outside India or raises a loan when there is still outstanding a loan made to it by the federation or the Governor-General in Council, or in respect of which a guarantee has been given by the Governor-General in Council or the federation, the consent of the federation is necessary under S. 163 (3). A consent may be given subject to conditions, and shall not be unreasonably withheld. If any dispute arises as to the reasonableness of the refusal to give consent or of the conditions imposed, the Governor-General shall decide it in his discretion. S. 164 deals with the power of the federation to make loans to or give guarantees in respect of, the loans contracted by, federated states. S. 165 lays down that sterling stock issued after the establishment of the federation shall be subject to the provisions of the Colonial Stock Acts 1877 to 1900. Under these Acts the colonial securities are admitted to trustee rank on condition that if legislation is passed by the Dominion which would affect the stock to the injury of the stock holders or involves a departure form the original contract in regard to the stock, such legislation would be disallowed. Such disallowance is not possible after the passing of the Statute of Westminster and hence now the Colonial Stock Act 1934 provides that in such cases the offending legislation should be amended as requested by the British Government.[51]

(*e*) *Audit and Accounts* (*Ss.* 166 *to* 171) : S. 166 deals with the Auditor-General of India who is appointed by His Majesty and whose conditions of service are fixed by His Majesty in Council. He can be removed from office only in like manner as a judge of the Federal Court. After ceasing to hold office he shall be ineligible for further office under the Crown in India. Neither his salary, leave rules, pension etc., can be varied to his disadvantage after his appointment. The duties etc., of the Auditor-General of India shall be fixed by His Majesty by Order in Council which can be varied or extended by a federal law introduced with the previous sanction of the Governor-General given in his discretion. The salaries, allowances, pensions etc. of the Auditor-General of India are charged on the revenues of the federation. Under the 1919 Act the Auditor-General of India was appointed by the Secretary of State for India in Council who also fixed his duties.

---

51. *Amendments in Ss.* 161 *to* 165.—S. 161 has been omitted.
In S. 162 omit "Subject to the provisions of Part XIII of this Act with respect to borrowing in sterling."
In S. 163 sub-section (4), for " the Governor-General and the decision of the Governor-General in his discretion shall be final " substitute " an arbitrator appointed by the Chief Justice of India, whose decision shall be final."
S. 165 omit.

There was also no constitutional provision that his report should be laid before the Indian Legislature (see now S. 169). The Auditor of Indian Home Accounts was under the 1919 Act appointed by the Crown by Warrant countersigned by the Chancellor of the Exchequer but now he is appointed by the Governor-General in his discretion. See *Simon Commission Report*, Vol. I, para. 432. S. 167 prescribes the procedure to be followed by a province for the appointment of a provincial Auditor-General. After 1st April, 1939 the Provincial Legislature has to charge the salary of the Provincial Auditor-General on the revenues of the province and three years after such an Act has been passed, the appointment can be made. The Provincial Auditor-General performs in relation to the audit of the province the same functions as the Auditor-General of India performs in relation to the audit of India. S. 166 also applies to a Provincial Auditor-General with the "Governor" substituted for "Governor-General" and the "Provincial Legislature" substituted for "Federal Legislature." Also, a person who has been Provincial Auditor-General is eligible for appointment as Auditor-General of India. S. 168 enables the Auditor-General of India to give directions with the approval of the Governor-General with regard to the methods in accordance with which provincial accounts ought to be kept. S. 169 lays down that the report of the Auditor-General of India relating to the accounts of the Federation shall be submitted to the Governor-General who shall lay it before the Federal Legislature, and the reports of the Auditor-General of India or of the Provincial Auditor-General, relating to the accounts of the province shall be submitted to the Governor who shall lay them before the provincial legislature. The Auditor of Indian Home Accounts is by S. 170 appointed by the Governor-General in his discretion who can also prescribe the conditions of his service. He shall perform such duties and exercise such powers in relation to transactions in the United Kingdom affecting the revenues of the federation or the provinces or of the Federal Railway Authority as may be prescribed by Order in Council or by a federal law varying or extending such Order introduced with the previous sanction of the Governor-General in his discretion. The report of the Home Auditor relating to such transactions shall be transmitted to the Indian and Provincial Auditors-General who shall include them in their reports. The Home Auditor is subject to the general superintendence of the Auditor-General of India and the former's salary, pension etc. are charged on the revenues of the federation. His Majesty may require the Home Auditor to peform in relation to Burma all or any of the functions which he performs in relation to India and fix by Order in Council the payments to be made from the revenues of Burma to the revenues of the Federation in respect of such services.[52]

---

52. *Amendments in Ss.* 166 *to* 171.—Ss. 170 and 171 have been omitted.

(*f*) *The Crown and the States* (Ss. 145 to 149) : S. 145 provides for the payment by the Federation to His Majesty of such sums as may be required for the exercise of the functions of the Crown in relation to Indian States. By S. 146 cash contributions from states, payments in respect of loans and other payments due from Indian States shall be received by His Majesty and if His Majesty so directs shall be placed at the disposal of the Federation. But His Majesty may at any time remit the whole or any part of such contributions or payments. S. 147 is based on the Davidson Committee Report. If tribute paying states are entitled to claim relief there is no reason why states which have ceded territory should be placed on a different footing and this view is found embodied in the section. The Committee recommended that the following annual credits should be allowed in respect of the territory ceded by the undermentioned states : Baroda 22·98 lakhs ; Gwalior 11·78 lakhs ; Indore 1·11 lakhs ; Sangli 1·1 lakhs. The section provides that His Majesty may agree to remit over a period not exceeding twenty years the cash contribution payable by a federated state. No such remission shall be made until the provinces have begun to receive their share of income-tax and immunities enjoyed by the state shall be set off against the contribution in making such remission. Where a state has ceded territory to the Crown in return for military guarantees or for discharge from obligation to provide military assistance compensation shall be paid to the state provided the guarantees are waived. Where before 2-8-35 a state has capitalised its contributions, it is also entitled to be repaid that sum either by instalments or otherwise. Hyderabad, Baroda, Gwalior, and Indore have ceded territory in exchange for military guarantees, and Sangli has ceded territory in return for discharge from obligation to render military assistance, while Indore and Dhar are examples of states which have capitalised their contributions. " Immunities " mean the right to levy sea customs, privilege of free service stamps, right to issue currency notes, right to compensation for closing down their salt works (Travancore), right to import goods in bond free from customs (Kashmir). If a state is entitled to an annual credit of four lakhs of rupees in respect of ceded territories and it enjoys immunities of the annual value of 10 lakhs of rupees, it is not entitled to any

---

S. 166 in sub-section (2), for " His Majesty in Council " substitute " Order of the Governor-General."

In sub-section (3), for " His Majesty in Council " substitute " the Governor-General."

S. 167 in sub-section (1), for " His Majesty " substitute " the Governor " and omit " after the expiration of two years from the commencement of Part III of this Act."

In paragraph (*b*) of sub-section (2), for " sub-section (3) " substitute " sub-sections (2) and (3)."

S. 166. The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 166 (1) substituted the words " Governor-General " for the words " His Majesty."

remission though it will continue to enjoy the immunity—Illustration to S. 147 (3) (*b*). Payments made under S. 147 and payments made to any state by the Governor-General in Council or by the Local Government under agreements entered into before 2-8-35 shall be charged on the revenues of the province or of the federation as the case may be, under S. 148. S. 149 lays down that in calculating the proceeds of any tax distributable to a federated state any privilege or immunity enjoyed by that state in respect of any former or existing source of revenue from a similar duty or tax or from goods of the same kind shall be set off against the distribution in so far as a federal law so provides.[53]

(2) Property, Contracts and Suits :

(*a*) *Property* (*Ss.* 172 *to* 174): S. 172 deals with the vesting of lands and buildings which before 1-4-37 were vested in His Majesty for the purposes of the Government of India. If they are situated in a Governor's province they vest in His Majesty for provincial purposes unless they were then used for a purpose which after 1-4-37 will become a federal or Crown Representative purpose or unless before that date they were used for such purposes or were intended to be so used and are certified by the Governor-General in Council or the Crown Representative to have been retained for future use for suchpurposes or to have been retained temporarily for the purpose of more advantageous disposal by sale or otherwise. Where there is a tenancy agreement between the Governor-General in Council and the Government of the Province the lands vest in the province notwithstanding the above provision. In the case of lands and buildings which do not under the above provisions vest in the province even though situated in a province and in the case of lands and buildings situated in India outside a Governor's province, they vest in His Majesty for federal or Crown Representative purposes according to the purpose for which they were used immediately before 1-4-37. There is a gap in S. 172 (1) (*b*) in that it does not provide for the destination of lands and buildings situated in a Chief Commissioner's province which were before 1-4-37 used for provincial purposes. The Federal Court in *In re Allocation of Lands and Buildings in Chief Commissioners' Provinces* applied S. 173 (1) (c) and held that such property vests in His Majesty for provincial purposes. The Court arrived at this result by giving a very wide meaning to the term 'property' occurring in S. 173 as also including land. In the case of lands and buildings which are situated outside India they vest in the federation unless before 1-4-37 they were used by the departments of the Secretary of State for India in which case they vest in His Majesty for United Kingdom Government purposes. Such lands

---

53. *Amendments in Ss.* 145 *to* 149.—Ss. 145 to 149 have been omitted by the India Provisional Constitution Order 1947.

and buildings vesting in His Majesty for United Kingdom Government purposes shall be under the control of the Commissioners of Works and cannot be sold without the consent of the Governor-General. A similar rule applies also to the contents of buildings vested in His Majesty for United Kingdom Government purposes other than money or securities. In the case of specified articles agreed upon between the Secretary of State and the Governor-General they shall be under the control of the Secretary of State and can be sold without the Governor-General's consent notwithstanding anything contained in the provisions above referred to. In the period 1-4-37 to 1-4-42 questions under S. 172 shall be determined by His Majesty in Council.

S. 173 deals with property other than lands and buildings (although the Federal Court in *In re Allocation of Lands and Buildings in Chief Commissioners' Provinces* held that the section applied also to lands and buildings in order to rectify a gap in S. 172 (1) (b) as noticed already). Such property which immediately before 1-4-37 was under the control of or in the possession of the Governor-General in Council or a Local Government vests in His Majesty for federal, Crown Representative, or provincial purposes according as the purposes for which they were held immediately before 1-4-37 become federal, Crown Representative, or provincial purposes after that date. All moneys which before 1-4-37 were in the public account vest in the federation and credits and debits of Governors' provinces (other than Burma) with the Governor-General in Council shall be credits and debits of the corresponding provinces.

Property vested in His Majesty and under the control of the Secretary of State for India in Council immediately before 1-4-37 shall as from that date vest in His Majesty for federal, Crown Representative, or provincial purposes according as the Secretary of State may determine having regard to the circumstances of the case. Arrears of taxes outstanding immediately before 1-4-37 may be recovered by the federation or by a provincial Government according as the tax after that date would be due to the federation or the provincial Government. Suppose a provincial item of taxation is from 1-4-37 transferred to the federation. According to a literal interpretation of S. 173 (4) it would be the federation which would be entitled to collect the arrears in respect of such taxes outstanding on 1-4-37. It is submitted that this is the correct interpretation and that S. 173 should not be read subject to S. 143 (which continues existing provincial taxes until a federal law otherwise provides) because nowhere is any indication found in S. 173 that it is subject to the provisions of S. 143, and it is reasonable to expect some such provision if the intention of Parliament was that S. 173 should be subject to S. 143. S. 173 applies to equipment, stores, moneys, bank balances and other property held in connection with His Majesty's Indian Forces stationed in Burma as it applies

in relation to property held for purposes which will be purposes of the Government of the Federation. Except as aforesaid the section does not apply to property situated in Burma or Aden or to arrears of taxes in Burma or Aden or to any property which immediately before 1-4-37 was under the control of the Governments of Burma or Aden.

By S. 174 property accruing to His Majesty by escheat, lapse or as *bona vacantia* vests in His Majesty for provincial purposes if the property is situated in a province and for purposes of the federation in other cases. In the case of property which at the date when it accrued to His Majesty was in the possession of or under the control of the federal or provincial government it shall vest in His Majesty for federal or provincial purposes according as the purposes for which it was then used are federal or provincial purposes. S. 175 lays down that the executive authority of the federation and of a province shall extend to the grant, sale, disposition or mortgage, of any property vested in His Majesty for federal or provincial purposes as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for the above purposes.[54] Lands or buildings used as an official residence for the Governor-General or the Governor cannot be sold nor any change made in the purposes for which they are being used except with the concurrence of the Governor-General or of the Governor in their discretion. Property acquired for federal, provincial or Crown Representative purposes shall vest in His Majesty for these purposes. Contracts expressed to be made by the federation or province shall be expressed to be made by the Governor-General or the Governor and shall be executed on behalf of the Governor-General or the Governor in such manner as they may direct. The Governor-General and the Governor are not to be personally liable in respect of contracts executed on their behalf nor shall the persons actually executing the contracts on behalf of the Governor-General or Governor be personally liable on such contracts.

(*b*) *Contracts and Suits* (Ss. 175 to 180) : Section 176 deals with the important topic of suits by and against the federation and the provinces.[55] The federation and the provinces can be sued or may sue in relation to their respective affairs in the like cases as the Secretary of State in Council could have sued and been

---

54. S. 175 (3).—A contract headed 'Government of Bengal' in the form of a letter addressed to a seller confirming the purchase made from him by the signatory on behalf of the Government is not in accord with the requirements laid down in S. 175 (3) because it is not expressed to be made by the Governor and is not binding on Government—*Province of Bengal* v. *S. L. Puri*, 51 C.W.N. 753.

55. S. 176.—The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 176 (1) substituted the words "dominion legislature" for the words "federal legislature."

sued if this Act had not been passed. The Federal and Provincial Legislatures may modify this right by legislation enacted by virtue of powers granted under the Act. Where the Federation, Province etc., sue or are sued in the United Kingdom service of proceedings may be effected upon the High Commissioner by rules of Court.

In England the rule is that the Crown cannot be sued for wrongs or breaches of contract committed by it. Only a Petition of Right can be brought in the following cases : (1) for damages for breach of contract (2) for specific restitution of property wrongfully detained in the possession of the Crown or for the value of such property. The Crown can also be made liable by Petition of Right in assumpsit for money received and kept in by the Exchequer which has been obtained by an illegal demand made by a servant of the Crown—*Brocklebank Ltd.* v. *King* (1925) 1 K.B. 52. In 1921 Lord Birkenhead appointed a Committee to consider the liability of the Crown to be sued ; it made its Report in 1927. Crown proceedings were no longer to be by way of Petition of Right but were to be proceeded with just like any other action in the High Court; the Crown was to be liable in tort as also for the acts of its servants. Proceedings by or against His Majesty in his private capacity were to be outside the bill. Sir Henry Slesser prepared in 1928 a bill on the same lines but it was not proceeded with.[56] In the Dominions also the Crown enjoys immunity from civil and criminal liability except in so far as it has been waived by statute. In Canada the Governor-General can allow a petition of right to be brought. There is no provision for action in the case of torts generally and the compensation which can be claimed from the Government in respect of torts connected with public works has been very carefully limited to matters immediately connected with operations on material buildings. There is no right for compensation in respect of injury done by a driver of a truck of the A. S. Corps on official business—*R.* v. *Moscoviz* (1935) S.C.R. 404. In one case only

---

56. The Crown Proceedings Act, 1947 (10 & 11, Geo. VI, C. 47) has abolished the immunity of the Crown from legal proceedings. The following are its more important provisions :—S. 2 (1) : An action in tort lies against the Crown, S. 2 (5) : But an action does not lie in respect of anything done or omitted to be done by any person while discharging responsibility of a judicial nature. S. 2 (6) : The servant should be appointed by the Crown directly or indirectly and paid wholly out of the Consolidated Fund, moneys provided by Parliament etc. Otherwise the Crown is not liable. S. 4 : The law as to indemnity, contribution, joint tort-feasors and contributory negligence applies to the Crown. S. 9 : No action for anything done in relation to a postal packet or done in relation to a telephone communication lies against the Crown. S. 10 : Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person or for causing personal injury to another person in so far as the death or personal injury is due to anything suffered by that person while he is a member of the armed forces of the Crown. S. 11 : Relates to savings in respect of acts done under prerogative and statutory powers.

R. v. *Joseph Cliche* (1935) S.C.R. 561 has Quebec held that damages for tort will lie. Petition of Right is regulated by statute in the federation, in British Columbia, Sasketchewan, Alberta, Manitoba, Quebec, and under rules of procedure in Ontario, but the Maritime provinces omit the provision. It is widely allowed under statute in the Australian Commonwealth and states, extending in some cases to torts in New Zealand and in the Union of South Africa where it is available in certain cases such as the *action de pauperie* e.g., damage done by a mule to an innocent passer-by, where none would have existed in English law as the mule was not of vicious character. *South African Railways* v. *Edwards* (1930) A.D. 3. It also lies in the Irish Free State.

The liability of the Crown to be sued in contract and tort assumes practical importance as a matter upon which the Courts may be called upon to adjudicate constantly. The earliest case on the subject is that of *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India in Council* (1861) 5 Bom. H.C.R. App. 1. There an injury was done to the plaintiff's horse by reason of the negligent conduct of workmen employed under Government in connection with the dockyard at Kidderpore. A distinction was drawn between a business or mercantile concern carried on by the Secretary of State, and acts done in connection with Governmental powers which could not be exercised save by the Sovereign, or any authority to whome such powers had been delegated by the Sovereign. Although an action in tort and not a petition of right will lie in England, plaintiffs had the right to sue the Secretary of State, because the act had been done in carrying on ordinary business, and not in exercise of governmental powers. Sir Barnes Peacock laid down the following dictum: 'Where the act is done or contract is entered into in the course of exercise of powers which cannot be lawfully exercised save by the Sovereign, no action would lie against the Secretary of State'. The principle laid down in the *P. & O.* case found practical application in *Nobin Chunder Dey* v. *Secretary of State for India in Council* (1875) 1 Cal. 11. There the plaintiff deposited money in order to get licence for *ganja* shops, and complained that he had not been given the licence, nor had the money been returned to him. Held, that the giving of licence, and the taking of excise duty from him was a matter done entirely in the course of sovereign powers, and that therefore no action lay. *Secretary of State* v. *Hari Bhanji* (1882) 5 Mad. 273, contains a qualification to the rule enunciated by Sir Barnes Peacock in the *P. & O.* case. The action was to recover salt duty surcharged. Held, that the liability is not restricted altogether to claims arising out of undertakings which may be carried on by private persons, but other claims, if not arising out of acts of State, can be entertained by the Civil Court, if the act were done under the sanction of municipal law. *Secretary of State* v. *Kamachee Boyee Saheba* (1859)

7 M.I.A. 476, and *Forrester* v. *Secretary of State for India* (1872) L.R.I.A. Sup., Vol. 10, were contrasted with the case in question. *Shivabhajan Durgaprasad* v. *Secretary of State for India in Council* (1904) 18 Bom. 314, related to the negligence of a chief constable in not properly taking care of hay which had been attached under the Criminal Procedure Code. Sir Lawrence Jenkins doubted whether Sir Barnes Peacock was right in holding that a suit could be brought against the Government, for a tort, that is, for a grievance for which in England a petition of right would not lie. He followed *Tobin* v. *Queen* (1864) 33 L.J.C.P. 199, where the captain of a certain ship took possession of another ship on the footing that she was engaged in slave trade, when she was not, and the Crown was held not liable.

The doubt whether the Secretary of State can be sued in respect of tort even in the case of business undertakings was put forward by Justice Fletcher, in 1911, in *McInerny* v. *Secretary of State for India in Council* (1911)36 Cal. 797. It was resolved by Lord Haldane in *Secretary of State for India in Council* v. *Moment* (1915) 40 Cal. 391 (P.C.). In *Moment's* case litigation had been going on between the Government and a private individual regarding certain land. Eventually the Courts held that the property belonged to the individual. Then the individual filed a suit in tort for damages against Government for wrongfully interfering with his property. A local Act enacted that all claims to right over lands against Government should be brought in the Revenue Court, and not in the Civil Court. Held, that the Act was *ultra vires* of the legislative authority of the local legislature. In *Ross* v. *Secretary of State for India in Council* (1915) 37 Mad. 55, a District Magistrate directed the closing of a certain labour depot in connection with the recruitment of coolies for the Assam tea-gardens. The act was done not in connection with the private undertaking of the Government or any mercantile concern in which the Government was engaged. Wallis, J., did not agree that no suit would lie against Government except in connection with a private undertaking, and he thought that the decision in *Nobin Chunder Dey's* case and similar cases had gone too far. Even in England the Crown is liable where the land, chattel or money of the subject has been detained, or a contract has been broken. The Government of India has no greater immunity than the Sovereign would have in England. The error is due to a misinterpretation of a dictum of Dr. Lushington in *Thomas Eales Rogers* v. *Rajendro Dutt* (1860) 8 M.I.A. 103. There a Superintendent of Pilot Services was sued for giving an order that damaged the plaintiff's business. The dictum was ' The question whether the order was given by the defendant in his public capacity as an officer of the State need not detain us here, because even if it were, and even if that would itself prevent the Government of India or the Secretary of State from being sued, the whole basis of the immunity of the Sovereign is that the remedy is against the individual '.

This view is based on a passage in Story on Agency which says: 'The Government itself is not responsible for the misfeasance, or wrongs, or negligence, or omissions of duty, of the subordinate officers or agents engaged in the public service, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and duties, and losses, which would be subversive of the public interests.' In *Ross's* case, however, Wallis, J. held that there was no remedy against the Collector. In this connection the case of *Viscount Canterbury* v. *Queen* (1842) 4 St. Tr. (N.S.) 767, is very instructive. The Speaker of the House of Commons occupied certain rooms in Westminster Palace. The Commissioners of Woods and Forests in getting rid of old lumber stored in rooms of the palace, burnt it in various stoves in different rooms of the palace, with the result that the palace took fire. The Court said: 'Even assuming that the fire had been caused by the personal negligence of the Commissioners, would the Crown in such a case have been liable? They are indeed styled servants of the Crown, but they are in truth public officers appointed to perform certain duties assigned to them by the legislature, and for any negligence in the discharge of such duty, and any injury that may thereby be caused, they alone are, I conceive, liable. It is supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury, which may be occasioned by their negligence or delinquency. At least some authority should be cited in support of such a doctrine.' In *Secretary of State for India in Council* v. *Cockraft* (1914) 39 Mad. 351, the plaintiff was injured by the negligent leaving of a heap of gravel on a military road he was using. On the authority of the *P. & O.* case it was held that in respect of all acts done under sovereign powers the Government was not liable for the negligence of the servants in the course of their employment. The military road was not a private undertaking, and the plaintiff's case was held not maintainable. In *Secretary of State for India in Council* v. *Shreegobinda Chaudhari* (1932) 59 Cal. 1269, the managers appointed by the Court of Wards to look after the estate of a disqualified proprietor did not spend on settlement operations as much as they claimed to have spent but thousand rupees less. They also spent on suits thousand rupees less than what they claimed to have spent thereon. The suit was against the Government in respect of these amounts. The Government Pleader argued that, under S. 41 (1) of the Court of Wards Act, 1879, suits lay only against the manager appointed by the Court of Wards. He also contended that the Government being in the position of a trustee was not responsible for the negligence of a properly appointed agent. Counsel for the other side contended that the liability of the manager was only to the Court of Wards and that the Government was not in the position of a

trustee. Rankin, C.J., in the course of a learned judgment (with which Ghose, J., concurred) traced the history of the legislation relating to the Court of Wards. Following the *P. & O.* case and *Moment's* case the Court held that where an act is done by an officer of Government in the course of exercise of powers which cannot be lawfully exercised save by the sovereign power, no action in tort lies against the Secretary of State for India in Council upon the principle of *respondeat superior*. A suit for damages does not lie against the Secretary of State for India in Council for misfeasance, wrongs or negligence or omissions of duties of managers appointed by the Court of Wards.

Municipal Corporation of the City of Bombay v. *Secretary of State for India in Council*, A.I.R. 1934 Bom. 277=152 I.C. 947=36 Bom. L.R. 568, lays down the requisites which must be satisfied by a contract entered into on behalf of the Secretary of State, in order that it may be binding on him. S. 30 of the Government of India Act, 1915, though it does not expressly lay down that a contract is to be by a formal document, provides that a contract must be on behalf of and in the name of the Secretary of State for India in Council. That provision makes it necessary that the contract should be evidenced by a formal document in the nature of an indenture or deed to which the Secretary of State for India in Council is a party. Such a contract cannot be entered into or evidenced by mere correspondence. As regards contracts by the Government to be made in the Educational Department, the only person authorised to enter into such a contract is the Director of Public Instruction. The Secretary to the Government in the Educational Department is not the authority to enter into the contract, so as to make it binding on the Government. Mirza, J. in the above case further held that apart from commercial transactions, there are only three exceptions in respect of which he (the Secretary of State for India in Council) could be made liable although the acts may be acts of State : (*a*) Trespass on immoveable property ; (*b*) Obligation imposed by statute ; (*c*) Where it can be shown that benefit has resulted to the Government from the tort of its servants. In *N.-W. Ry. Administration* v. *N.-W. Ry. Union, Lahore*, 14 Lah. 330=A.I.R. 1933 Lah. 203=34 P.L.R. 975, Addison, J., held that no official of Government executing any contract on behalf of the Secretary of State for India in Council shall be personally liable in respect thereof. In *R.-N. Singha* v. *Secretary of State for India in Council*, A.I.R. 1928 Rang. 70=5 Rang. 825=109 I.C. 180, Baguley, J. held that a suit for the recovery of income-tax wrongly assessed would lie against the Secretary of State for India in Council. In *Etti* v. *Secretary of State*, I.L.R. (1939) Mad. 843, Lakshmana Rao, J. held that a father cannot sue the Government for the loss of his son whom he had left for treatment in a Government Hospital due to the negligence of the hospital authorities because the maintenance of a hospital is a sovereign or Governmental function.

The relevant provisions under the Government of India Act, 1935, are contained in Ss. 175 to 180. S. 177 provides that a contract made before the commencement of Part III of the Act by or on behalf of the Secretary of State for India in Council, shall as from that date (*a*) if made for the purposes of the province have effect as if it had been made on behalf of the province, (*b*) and in other cases have effect as if it had been made on behalf of the Federation. S. 178 lays down that liabilities in respect of such loans, guarantees etc. of the Secretary of State in Council as are outstanding immediately before 1-4-37 shall as from that date be liabilities of the Federation and may be enforced in accordance with the provisions of S. 179.[57] Enactments relating to such loans etc., continue to have effect with the words ' Secretary of State' substituted for the words 'Secretary of State in Council' and with such other modifications as His Majesty in Council may deem to be necessary. S. 178 applies to the liability of the Secretary of State in Council in respect of the Burma Railways three per cent debenture-stock. Deduction cannot be made in respect of federal or provincial taxes from any payment of interest or principal in respect of any securities, the interest whereon is payable in sterling. S. 179 (1) provides that any proceedings which if this Act had not been passed might have been brought against the Secretary of State for India in Council, may in the case of liability arising before the commencement of part III of this Act, or under any contract or statute, made or passed before that date, be brought against the Federation or a province, or at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of damages, debt or costs in any such proceedings shall be paid out of the revenues of the province or the Federation, or if the proceedings are brought against the Secretary of State, out of such revenues as he may direct. S. 179 (2) provides that if at the commencement of part III of the Act proceedings are pending in the United Kingdom or in India to which the Secretary of State for India in Council is a party the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State for India in Council, and the provisions of sub-section (1) of S. 179 shall be applicable to sums ordered to be paid and costs and expenses incurred by the Secretary of State or Secretary of State in Council in connection with such proceedings. S. 179 (3) provides that any contract made in respect of the affairs of a province or the Federation by or on behalf of the Secretary of State after the commencement of part III of the Act, may provide that any proceedings under such contract should be brought by or against

---

57. S. 178.—The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 178 (3) substituted the words " Dominion Legislature " for the words " Federal Legislature."

the Secretary of State for India in the United Kingdom, and any sums ordered to be paid by way of debt or damages in such proceedings and any costs incurred therein may be paid out of the revenues of the Federation or the province as the case may be. S. 180 (1) provides that any contract made before the commencement of part III of this Act by or on behalf of the Secretary of State in Council, solely in connection with the exercise of the functions of the Crown in its relations with Indian States, shall, as from the commencement of part III of the Act, have effect as if it had been made on behalf of His Majesty. S. 180 (2) provides that any proceedings which if this Act had not been passed might have been brought by or against the Secretary of State in Council, in respect of any such contract as aforesaid, may be brought by or against the Secretary of State, and if at the commencement of part III of the Act proceedings in respect of any such contract are pending in the United Kingdom or in India to which the Secretary of State in Council is a party the Secretary of State shall be deemed to be substituted for the Secretary of State in Council, in these proceedings. S. 180 (3) provides that any contract made on behalf of His Majesty after the commencement of part III of the Act, solely in connection with the exercise of the functions of the Crown in relation to Indian States, shall, if such a contract would have been legally enforceable against the Secretary of State in Council, be enforceable against the Secretary of State. S. 180 (4) provides that any sums ordered to be paid by way of debt or damages in such proceedings and any costs incurred therein shall be deemed to be sums required for the discharge of the functions of the Crown in relation to Indian States, and any sums received by the Secretary of State in such proceedings shall be paid or credited to the Federation. As to the right of wrongfully dismissed Government servants to sue Government for damages see notes to S. 240 *post*. See also Indian Independence Act 1947 (10 & 11 Geo. VI, C. 30), S. 15, Appendix A *post*.

CHAPTER XIII

THE SERVICES OF THE CROWN IN INDIA

(Sections 232–277)

This topic can be conveniently grouped under the following sub-headings : (1) Right of Dismissed Government Servants to sue for Damages etc. (S. 240). (2) The Civil Services (Ss. 240 to 263). (3) The Defence Services and Chaplains (Ss. 232 to 239 and S. 269). (4) Public Service Commissions (Ss. 264 to 268). (5) Indemnity for past Acts, Protection of Public Servants from Suits etc., Qualifications for holding Offices, etc. (Ss. 270 to 277).

(1) Right of Suit of Dismissed Government Servants :[58] The position under the Government of India Act 1919 was that

---

58. *Tenure of Office of Civil Servants in the United Kingdom and in the Dominions:* From the decided cases the following rules can be deduced regarding the tenure of civil servants in England and in the Dominions : (i) Generally a civil servant holds office during His Majesty's pleasure i.e., he can be dismissed arbitrarily without any reasons being assigned and he cannot claim damages for such wrongful dismissal. In *Dunn* v. *Queen* (1896) 1 Q.B. 116 the suppliant sued the Queen for dismissing him from his post. He alleged that Sir Claud MacDonald had engaged him as consular agent for three years and he claimed damages for dismissal before the expiration of that period. The Court decided that the suppliant held his appointment during pleasure. Dunn afterwards sued Sir Claud MacDonald, and the Court in *Dunn* v. *MacDonald* (1896) 1 Q.B. 555 held that where a public servant acting on behalf of the Crown makes a contract with a person he is not responsible for a breach of such contract, (ii) In some cases tenure during the Crown's pleasure may be negatived by the provisions of some statute which lays down the conditions under which a servant of the Crown can be dismissed. In *Gould* v. *Stuart* (1896) A.C. 515 a person was appointed a clerk in the New South Wales Civil Service. The New South Wales Civil Service Act 1884 gave a superior officer or the minister the power of suspending subordinate officers. If the order of suspension was made by the officer it required the confirmation of the minister and, if it was made by the minister an appeal lay against such order to the Governor in Council, who could either dismiss the officer or reduce him in rank or fine him. The plaintiff was dismissed in violation of this statute and the Privy Council held that it was clear from the Act that the tenure was during good behaviour and not at pleasure, and awarded him £1,500 as damages. (iii) All the defences available to an action on a contract would also be available to an action on a contract entered into by the Crown. Impossibility of performance may thus discharge a contract of service between the Crown and a civil servant. In *Reilly* v. *King* (1934) A.C. 176 a person was appointed member of the Federal Appeal Board charged with the task of disposing of pension claims. The members of the Board could be removed for due cause shown. The person appointed (Mr. Reilly) had his term renewed in 1928 for five years. But in 1930 the Dominion Legislature of Canada abolished the Federal Appeal Board and created in its stead a new body called the Pensions Tribunal. Mr. Reilly was not appointed a member of this tribunal and he automatically vacated his office. It was held by the Privy Council that he could not sue the Crown for damages because the contract of service had been discharged by being rendered impossible of performance

by S. 96 (*b*) of that Act every servant of the Crown in India held office during His Majesty's pleasure subject to rules framed

---

due to abolition of the office. (iv) Even though the relationship between the Crown and its servants may in some cases be a contractual one, all the incidents attaching to a contract do not automatically apply to this special kind of contract. The salary which a civil servant draws is only a bounty and he cannot sue in a court of law to enforce payment of the same. Neither can he sue for arrears of pay. The salary is not a debt owed by the Crown to him and cannot be attached by his creditors in execution of decrees which they might have obtained against him. He cannot also assign or transfer his salary to a third person, because it is given to him to enable him to maintain the dignity of his office and this purpose would be defeated if he were allowed to assign it. The above points were decided in *Lucas* v. *Lucas and High Commissioner for India* (1943) P. 68. The argument that because a soldier's salary is not attachable a similar rule should also apply to a civil servant's salary is fallacious. The conditions of service of members of the Armed Forces are quite different from those of the members of the Civil Service. The former acquire a legal status on their entering the military profession and the State takes an interest in the domestic responsibilities of soldiers and sees to it that they fulfil their matrimonial obligations. A soldier can set apart a percentage of his salary as an allowance for his wife and this sum along with a contribution made by the State is paid direct to his wife. The Army Act also provides for compulsory deductions from the soldier's salary. If a soldier has left his wife or legitimate child under sixteen destitute his salary must be cut so as to make provision for the maintenance of his dependants. Hence the rule exempting a soldier's pay from attachment does not really work much hardship in practice because his dependants have other remedies open to them through which they can enforce their claims. To apply a similar rule to civil servants would be inconvenient and unjust. Another criticism which can be levelled against *Lucas* v. *Lucas* is that it professes to follow a long line of previous decisions on this topic when the reasoning behind these decisions is no longer applicable owing to the changed circumstances of the present day. Truly in *Lucas* v. *Lucas* the Probate Division has over-looked the healthy legal maxim *'Cessante ratione legis cessat ipsa lex.'*

In the eighteenth century there were weighty reasons against permitting a civil servant to assign his salary which no longer hold good and the application of the 18th century outworn doctrine to modern times would be fraught with mischievous consequences. In those days public servants in England were not paid salaries but took all the collections or fees which were left after defraying the expenses of running the office. Under these circumstances the interests of the State and of the public would suffer if the public servants were allowed to assign their emoluments or fees and thus reduce themselves to a position in which they would find it difficult to find the wherewithal to run their offices. The public interest would suffer because if the servant committed any wrong in the course of his official activities he would have no money left to pay any damages that might be awarded against him. These considerations no longer apply and there is no reason why at the present day a civil servant's salary should be immune from assignment and attachment. The third argument for the Crown which was accepted in *Lucas* v. *Lucas,* namely, that the civil servant's salary is not a debt and hence is not attachable, is equally fallacious because it is one thing to say that the Crown can terminate the services of its servants at pleasure and quite another thing to say that the latter are not entitled to remuneration for services already performed by them while in office. See in this connection an article by Dr. D. W. Logan in 61 L.Q.R. 240 (1945) *'A Civil Servant and his Pay.'* In (1942) F.C.R.113 the Federal Court of India has held that a civil servant in India can sue for arrears of salary.

under the Act. The question which arose for decision was whether a breach of such rules gave an aggrieved Government Servant a right to sue in a court of law. The Privy Council in two cases held that the rules amounted only to a solemn assurance given by the Crown that they would not be lightly disregarded and did not constitute a contract between the Crown and the servant giving rise to a legal action for a breach thereof. In the first case *Rangachari* v. *Secretary of State for India*, 64 I. A. 4 certain charges of improper conduct were made against a Sub-Inspector of Police and while these were being enquired into he was allowed to retire on medical grounds and was given an invalid pension from September 1927. In February 1928 after he had drawn the pension for three months he was dismissed with effect from the date of his retirement. He filed a suit for a declaration that he had been wrongfully dismissed and for damages. The Madras High Court dismissed the suit on the ground that the Civil Courts had no jurisdiction to entertain suits by retired Government servants in respect of their pensions because the Pensions Act 1871 expressly bars the jurisdiction of Courts in respect of claims for pensions. The Privy Council on appeal held that though the appellant's dismissal after retirement was wrongful it was not actionable in a Court of Law. No doubt the Pension Rules framed under the 1919 Act formed a part of the Act but the only appropriate remedy for a breach of these rules was a petition to the Government and not a suit in a Court of Law. S. 96 (*b*) of the 1919 Act lays down that no Government servant can be dismissed by an authority subordinate to that by which he was appointed. There was clearly a violation of this provision in *Rangachari's case* because the appellant was appointed by the Inspector-General of Police and dismissed by a Deputy Inspector-General of Police. The Privy Council held that the appellant was as a matter of law entitled to a declaration that he had been dismissed in violation of S. 96 (*b*) but refused to give the declaration asked for on the ground that after the lapse of so many years no useful purpose would be served by making such a declaration. In *Venkata Rao* v. *Secretary of State for India*, 64 I. A. 55 the appellant was a Reader in the Government Press, Madras and was suspected of being involved in the leakage of question papers for the Pleadership Examination. He was asked to vindicate his character in a Court of Law and while proceedings by him were still pending he was suspended in August 1924 and dismissed a month later. Rule 14 of the Civil Service Classification Control and Appeal Rules, provides some safeguards for a Government servant. Before he is dismissed there should be a Departmental Enquiry except in cases where the dismissal is based on facts established at a judicial trial, or where the Government servant has absconded. A definite charge in writing should be made in respect of each offence and the evidence in support of the charge as well as the evidence in favour of the Government servant should be recorded in his presence.

In *Venkata Rao's case* the appellant was dismissed mainly on the evidence of a colleague of his recorded in his absence. The High Court of Madras held that although it had been proved that Rule 14 had not been complied with substantially, still the plaintiff was not entitled to succeed. The Privy Council on appeal affirmed the decision of the High Court and pointed out the confusion, not to say the inconvenience, which would result if the Government were to manage its Services under the direct control of the Court. Moreover these rules were variable and liable to change from time to time and it would not be proper to give a right of action for their breach. The argument for a limited and special kind of employment during pleasure but with a superadded contractual term that rules would be observed was too far-reaching and complicated to commend itself for acceptance. Moreover the whole policy of the 1919 Act was to place redress in such cases in the hands of the Secretary of State for India who had complete and all comprehensive control over the Civil Services in India. The task of giving redress in this particular case was the duty, and their Lordships hoped would be the pleasure of the Executive Government. (In fact in both the above cases justice was done to the parties in June 1937 by the Government through appropriate executive action). In *Suraj Narain* v. *Frontier Province* (1941) F.C.R. 37 the plaintiff was a Sub-Inspector of Police who had been appointed by the Inspector-General of Police in 1928. In 1934 the Police Rules were amended authorising the Deputy Inspector-General of Police to dismiss officers like the plaintiff. In 1938 he was dismissed by the Deputy Inspector-General of Police. The plaintiff sued for a declaration that his purported dismissal was void and inoperative and that he still continued to be in service. One argument for the Crown was that S. 243 expressly laid down that the conditions of service of Police Officers should be governed by the Police Acts and not by S. 240 of the 1935 Act, and that in cases of conflict the former should prevail. The Federal Court held that the phrase 'conditions of service' did not cover the authority by which the Police Officers could be dismissed. Hence a dismissal of a Police Officer by a subordinate authority was void whatever the Police Act might say. The alternative ground on which the Federal Court based its judgment was that even assuming for a moment that the phrase 'conditions of service' included the power to dismiss, still the plaintiff had some rights before the 1935 Act and he could not be deprived of them. The amendment to the Rules made in 1934 was itself ineffective so far as the plaintiff was concerned because S. 93 (*b*) of the 1919 Act clearly laid down that no Government Servant could be dismissed by any subordinate authority and there was no exception to this rule. In the result the Federal Court gave him the declaration prayed for.

S. 240 of the Government of India Act 1935 lays down that except as otherwise provided by the Act every civil servant in India

holds office during His Majesty's pleasure. Sub-section (2) says that no such person shall be dismissed by any authority subordinate to that by which he was appointed and sub-section (3) lays down that no such person shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him except in cases where the dismissal is based on conduct which has led to his conviction on a criminal charge, or the authority empowered to dismiss is satisfied for reasons to be recorded in writing that it is not reasonably practicable to give him an opportunity of showing cause. Sub-section (4) says that in the case of persons employed on a contract basis if before the expiry of their term the post is abolished or their services are terminated for some reason not connected with misconduct on their part, the contract may provide for payment of compensation to them. The India Provisional Constitution Order 1947 says that in the case of a person who was appointed to a civil service in India before 15th August 1947 by the Secretary of State for India and continues to be in the service of the Dominion of India after that date, he cannot be dismissed by any authority inferior to the Governor-General if he is serving the Dominion, or the Governor if he is serving a Province.

The Courts have been called upon to decide the question whether a Government servant who is dismissed in contravention of the provisions of sub-sections (2) and (3) of S. 240 is entitled to any and if so what relief in a Court of Law. In *I. M. Lal* v. *Secretary of State for India* (1945) F.L.J. 129 a member of the Indian Civil Service was charged with nepotism and a departmental enquiry was held. It was first conducted by one officer and afterwards completed by another officer. Mr. Lal asked the Government to furnish him with the reports of both these officers and in spite of repeated requests the Government did not furnish him with these reports. On these facts the majority of the Federal Court (Spens, C. J. and Zafrulla Khan, J.) held that Mr. Lal had not been given a reasonable opportunity of showing cause under S. 240 and that therefore he was entitled to claim damages from Government for wrongul dismissal. Varadachariar, J. dissented and held that Mr. Lal had been given a reasonable opportunity of showing cause and hence he could not sue. All the judges were agreed that if a violation of sub-section (3) was proved Mr. Lal was entitled to relief. The position has changed after the passing of the 1935 Act and the law under the 1919 Act was different. S. 94-B of the 1919 Act laid down that subject to the provisions of that Act and of rules made thereunder every civil servant in India held office during His Majesty's pleasure. In *High Commissioner for India* v. *I. M. Lall* (1948) 2 M.L.J. 55 (P.C.) the Privy Council affirmed the judgment of the Federal Court in *Lall's case* (1945) F.L.J. 129 (F.C.) and held that S. 240 (3) was mandatory. " If the civil servant has been through an enquiry under Rule 55 it would

not be reasonable that he should ask for a repetition of that stage if duly carried out, but that would not exhaust his statutory right and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry.——— In the opinion of their Lordships no action is proposed within the sub-section until a definite conclusion has been come to on the charges and the actual punishment to follow is provisionally determined on." Per Lord Thankerton in the above case. In the above case the Privy Council held that for the declaration of the Federal Court that the purported dismissal of Mr. Lall of 4-6-40 was void and inoperative there should be substituted the declaration that Mr. Lall continued to be a member of the Indian Civil Service on 20th July 1942, the date of the institution of the suit. As regards the remedy, the Privy Council was of the view that the order of the Federal Court remitting the case to the High Court for the assessment of damages was wrong. No action lies against the Crown for a tort and even on the basis of contract a civil servant cannot sue the Crown for arrears of salary as was laid down in *Mulvenna* v. *The Admiralty* (1926) S.C. 842. In the contract of service between the Crown and its employees there is implied a condition that they will not have a right to sue in a Court of Civil Justice for arrears of salary. Their only remedy in such cases is of an official or political kind. *Gibson* v. *East India Company* (1839) Bing. 5 (N.C.) 762 was also referred to by the Privy Council to show that the remedy of the civil servant in such cases was only by way of petition, memorial or remonstrance. The Privy Council in *Lall's case* has practically overruled the Federal Court decision in *Punjab Province* v. *Tarachand* (1947) F.L.J. 56 (F.C.) holding that a civil servant can maintain an action for recovery of arrears of pay. With respect it is submitted that the Federal Court judgment in (1947) F.L.J. 56 is more exhaustive and covers all aspects of the case. The Privy Council has in its judgment not referred to the Civil Procedure Code at all which says that a Government Servant's salary is attachable. The idea of a limited kind of office during pleasure with the condition superadded that in certain specified circumstances the civil servant will have a right of action in a Court of Law has itself nothing much in it to commend itself except its novelty. It would be better if Ss. 240 (2) and (3) are construed to be directory only and the law placed on a uniform, rational and intelligible basis. The Privy Council decision in *Lall's case* has the effect of introducing a new kind of office during pleasure with limitations on the Crown's exercise of its pleasure, a no man's land between office during pleasure and office during good behaviour, the remedy in the event of the Crown failing to conform to those limitations being declaratory and not compensatory. Formerly a dismissed civil servant in India had to petition the authorities for redress. After *Lall's case* it is settled that he has to petition after suing in a Court of Law and getting

a declaration that his purported dismissal is wrongful and inoperative.

In *Secretary of State for India* v. *Venkata Rao*, 64 I.A. 55 the plaintiff complained that he had been dismissed from service after an enquiry which did not comply with the requirements of Rule 14 given above. The Privy Council held that after all these rules were only rules and liable to be changed often although the 1919 Act referred to them and hence it would not be advisable to give a remedy for their breach. The rules were merely a statutory and solemn assurance that the right of the Crown to terminate the services of its servants at pleasure would not be exercised arbitrarily or capriciously and did not constitute a contract between the Crown and the civil servant. The reasoning behind this judgment is no longer supportable after the 1935 Act because some of these rules have not been relegated to the position of mere rules but actually incorporated into the 1935 Act itself e.g., in sub-sections (2) and (3) of S. 240. Hence for the breach of any of these sub-sections a suit lies at the instance of the dismissed Government servant. The question has also arisen whether in the case of a dismissal in contravention of sub-section (2) a dismissed Government servant is entitled to claim arrears of salary. The position is complicated by reason of the rule of English law that the salary of a Government servant is a mere bounty for which he cannot institute a suit in a Court of Law. See *Lucas* v. *Lucas* (1943) P. 68. In *Punjab Province* v. *Tarachand*, A.I.R. (1947) F.C. 23 the Federal Court has held that the law in India is different. In that case the respondent had been appointed a Sub-Inspector of Police in 1911 by the Deputy Inspector-General of Police and in 1938 he was dismissed by the Superintendent of Police, Amritsar in violation of the injunction laid down by sub-section (2) of S. 240. He should normally have retired in January 1941 and he instituted his suit against the Government in April 1942. The Federal Court confirming the judgment of the Lahore High Court held that he was entitled to sue for arrears of his salary for that period of his service which fell within the 3 years preceding the date of the institution of the suit because Article 107 of the Limitation Act applied to the case, and gave him arrears of salary for 22 months from April 1939 to January 1941. The Federal Court held that the principle of *Lucas* v. *Lucas* was inapplicable to India because of the directly contradictory provisions of S. 60 and Order 21, Rule 48 of the Civil Procedure Code. Under S. 60 the salary of a Government servant to the extent of the first 100 rupees and one half of the remainder is not attachable. Order 21, S. 48 says that the disbursing officer should in case an officer's salary is attached, pay over the amount attached direct to the officer's creditor. If he wrongfully pays the amount attached to the officer, the Government will have to make good the loss to the creditor of the officer. It could not have been the intention of the legislature that the officer should be placed in a worse position than

his creditor. The only reasonable conclusion is that a Government servant in India can sue for his salary and also for arrears of his salary. That this is the law was assumed by the Federal Court in an earlier decision (1942) F.C.R. 113. The difference between sub-sections (2) and (3) is this. In the case of a dismissal in breach of sub-section (2) the order of dismissal is illegal and void and not worth the piece of paper on which it is written and the officer who is purported to have been dismissed still in the contemplation of the law continues to be in the service of the Crown. An order of dismissal contravening sub-section (3) stands on a different footing. Here the dismissal is valid but the officer dismissed has a right to sue for damages for wrongful dismissal if he can bring his case within the sub-section. The Indian cases have followed the distinction made by the Privy Council between rules and Acts. If a civil servant is dismissed in violation of the former he cannot sue in a Court of Law. It is otherwise if there is a violation of a statute. *Shenton* v. *Smith* (1895) A.C. was a case where a doctor in Western Australia was dismissed in violation of regulations governing the conditions of his service and it was held that he could not sue. *Gould* v. *Stuart* (1896) A.C. is the leading example of the other class of cases. In this case a clerk in N.S. Wales was dismissed in violation of the N.S. Wales Civil Servants Act 1884 and the Privy Council upheld his right to claim damages against the Crown by petition of right.

In *Governor-General in Council* v. *Krishnaswami Pillai* (1946) F.L.J. 16 (H.C.) the Madras High Court has held that when an action is brought under S. 240 (3) of the 1935 Act a declaration that the dismissal is void and inoperative cannot be given. The only relief which the Court can grant is a decree for damages for wrongful dismissal. Where a Government servant is dismissed without any disregard of any of the statutory rules governing the matter he has no right of action in a civil court—*Maqbool Husain* v. *Government of U.P.*, A.I.R. (1947) Oudh 210. The effect of the Privy Council and Federal Court rulings on the matter can be summarised thus : (i) A civil servant has no cause of action in a court of law for a termination of services in consonance with service rules—*Maqbool Husain* v. *U. P. Government*, A.I.R. (1947) Oudh 210. (ii) For a dismissal in violation of S. 240 (2) the remedy is a declaration that the dismissal is wrongful and recovery of arrears of salary—*Punjab Province* v. *Tarachand*, A.I.R. (1947) F.C. 23. (Doubts on this decision have been cast by the Privy Council decision in *High Commissioner for India* v. *I. M. Lall* (1948) 2 M.L.J. 55 though the Federal Court decision is not referred to in the judgment of the Privy Council.) (iii) For a dismissal in violation of S. 240 (3) the remedy is a declaration that the purported dismissal is wrongful and not damages for wrongful dismissal—*High Commissioner for India* v. *Lall* (1948) 2 M.L.J. 55 (P.C.).

In *Veeraswami* v. *Province of Madras*, A.I.R. (1948) Mad. 379 a peon in the forest department was guilty of misconduct and charges were framed against him and an enquiry was held and he was directed to show cause against the dismissal for misconduct. The peon was suspended for six months and on appeal the Conservator of Forests enhanced the punishment to dismissal. Due to irregularity in procedure a second enquiry was held and direction to show cause against dismissal was not repeated in the second charge sheet. As a result of the enquiry the peon was dismissed. Held the presence of direction to show cause in the first charge sheet did not amount to reasonable notice of proposed action and hence the peon had been improperly dismissed. Where the long delay for the inquiry is largely due to the obstructive tactics employed by the peon and he is at liberty at any rate from the time of the final order to look for alternative employment and does not do so, he would be reasonably compensated by a payment of two years' pay. A public servant whose conduct is enquired into has no common law or statutory right to appear by counsel. (The reasoning behind the above decision of Horwill and Satyanarayana Rao, JJ. must be held to be no longer applicable after the Privy Council ruling in *High Commissioner for India* v. *Lall*(1948) 2 M.L.J. 55 (P.C.) holding that a civil servant cannot recover arrears of salary). The question whether a civil servant was given opportunity of showing cause within the meaning of S. 240 (3) is a question of fact or at best a question of law arising out of the interpretation of facts and no question of the interpretation of the 1935 Act arises and no certificate under S. 205 should be granted—*Ibid.*

Section 240 *Proviso* : Where a police constable is convicted and sentenced for contempt of Court in respect of highly defamatory accusations against the honesty of presiding officers of Courts in connection with a civil litigation of his own and in consequence dismissed from service without notice the dismissal is valid[59]—*Venkatarama Naidu* v. *Province of Madras* (1946) 1 M.L.J. 253.

(2) The Civil Services (Ss. 240 to 263) : A general survey of these sections would be a natural prelude to a detailed consideration of some of them. S. 244 gives the Secretary of State power to

---

59. Government servant dismissed in contravention of S. 240 (2) while under suspension does not revive suspension and the dismissed servant can claim arrears of salary upto a maximum period of three years—*Provincial Government, C.P. & Berar* v. *Syed Shamshul Hussain* (1948) N.L.J. 365 must be deemed to be overruled so far as recoverability of arrears of salary is concerned by *High Commissioner for India* v. *Lall.*

A notification published in the Gazette of India dated October 23, 1948 enables the Governor-General "to order compulsory retirement from service of any Government servant subject to the rule-making control of the Governor-General, who after 14th August, 1947, has been in the employ of any Government outside the Dominion of India for any period and whose retention in public service of the Dominion is, in the opinion of the Governor-General, prejudicial to national security".

continue recruitment after 1-4-37 to the I.C.S., I.M.S. and I.P.S., until Parliament otherwise determines. S. 245 gives him a similar power in respect of the Indian Irrigation Service. The conditions of service of persons recruited by the Secretary of State as respects pay, leave, pensions, right to medical attendance shall be prescribed by rules made by the Secretary of State and as respects other matters shall be prescribed by rules made by the Governor-General or Governor as the case might be, in so far as the Secretary of State has not by rules made any provision in that behalf (S. 247). These provisions are applied to persons appointed by the Secretary of State before 1-4-37 by S. 250. Rules or Orders affecting adversely the pay, allowances, pensions etc., of such persons cannot be made by any person except the Secretary of State (S. 258 (3)). The conditions of service of persons serving the Federation are prescribed by rules made by the Governor-General and the conditions of service of servants of Provincial Governments are prescribed by rules made by the Governor. In the case of persons who were appointed before 1-4-37 their conditions of service cannot be altered to their disadvantage by any person except a person empowered by the Secretary of State to give directions in that respect and they shall after 1-4-37 have the same rights of appeal from orders which punish, or censure them or terminate their services, etc., as they had before that date (S. 241 (3)). The Railway services are recruited by the Federal Railway Authority which also prescribes the conditions of service of members of the railway services. Rules regulating the recruitment to superior railway posts are framed by the Federal Railway Authority in consultation with the Federal Public Service Commission and in recruiting persons to such posts and in recruitment generally for railway purposes, due regard shall be paid by the Authority to the past association of the Anglo-Indian community with the railway services in India and to any instructions which may be issued by the Governor-General to secure fair representation to the various communities of India in the railway services S. 242 (1) and (2). In framing rules regulating the recruitment to customs, postal, and telegraph services the Governor-General shall have due regard to the past association of the Anglo-Indian community with the said services S. 242 (3). Recruitment to the staff of the Federal Court and of the High Courts and the regulation of the conditions of service of such staff are done by the Chief Justice of India and the Chief Justice of a High Court respectively. Where a person not already attached to such Court is to be appointed to an office connected with the Court the Governor-General or Governor in their discretion may require the Federal or Provincial Public Service Commission to be consulted.

Rules made by the Chief Justice of India or a Provincial Chief Justice relating to the salary, allowances, leave or pensions of Federal Court and High Court staff require the approval of the

Governor-General or the Governor as the case may be—S. 242 (4). The general effect of the above sections is that in the case of services recruited by the Secretary of State he can regulate the conditions of service in regard to important matters like pay, leave etc., and in regard to minor matters the Federal or Provincial Government can make rules in the absence of rules made by the Secretary of State. Recruitment to the Central Services and regulation of the conditions of service of servants of the Federation are within the competence of the Federal Government and a similar rule applies to the Provincial Services. The only exceptions are : Railway Services are recruited by the Federal Railway Authority and fair representation should be given to the Anglo-Indians in this service as also in the Customs, Postal and Telegraph services. Staff of the Federal Court and of the High Courts are recruited and their conditions of service determined generally by the Chief Justice of India or the Provincial Chief Justice as the case might be. The provisions of Part X of the 1935 Act have been applied also to the staff of the High Commissioner for India and the Auditor of Indian Home Accounts.

Section 241 deals with recruitment to and the prescribing of the conditions of service of, the Federal and Provincial Services. See the Classification Control and Appeal Rules Nos. 9, 56, 58 (*a*) and (*b*), 40 (1) proviso. See also the Civil Services (Governors' Provinces) Delegation Rules 1926. In exercise of the powers conferred by S. 241 (3) (*a*) the Secretary of State hereby authorises the Governor-General in the case of persons serving in connection with the affairs of the Federation and the Governor in the case of persons serving in connection with the affairs of a Province to give the directions referred to in the said paragraph, so however, that in giving such direction the Governor-General or the case may be the Governor, shall exercise his individual judgment (Government of India Finance Department Notification No. F. 1 (12) Ex. 1/37 dated 17th February 1938). S. 242 deals with the railway customs, postal, telegraph services and Federal Court and High Court staff. By a Resolution of the Home Department of the Government of India of 4th July 1934 the claims of the Anglo-Indian and domiciled European community will be considered in respect of Indian vacancies in the Gazetted Railway Posts if their share falls below nine per cent, while eight per cent of the railway subordinate posts to be filled by direct recruitment will be reserved for them. The original clause 231 of the Government of India Bill did not single out the Anglo-Indian community for special mention nor did it contain a reference to the Customs, Postal and Telegraph services. See the Joint Parliamentary Committee Report paragraph 321. From 1943, 12½% of the posts in the All-India Services have been reserved to be filled up by members belonging to the Scheduled Castes. S. 243 lays down that the conditions of service of the subordinate ranks of the various police

forces shall be determined by the Acts relating to these forces. See *Surajnarain* v. *Frontier Province* (1941) F.C.R. 37 under notes to S. 240 *ante*. Ss. 244 to 249 deal with the services recruited by the Secretary of State for India. The Joint Parliamentary Committee (paragraphs 296 to 297) thought that the functions performed by the members of the Indian Civil Service and the Indian Police Service were so essential to the general administration of the country and the need therefore for maintaining a supply of recruits European and Indian of the highest quality was so vital to the stability of the new constitution itself, that they could not view without grave apprehension an abrupt change in the system of recruitment for these two Services simultaneously with the introduction of fundamental changes in the system of Government. Since recruitment by the Secretary of State would be incompatible with Provincial Autonomy the J.P.C. Report recommended this as a subject for consideration by His Majesty's Government. The alternative of recruitment by the Governor-General in his discretion, was rejected by the J.P.C. Report since this would be tantamount to recruitment by the Secretary of State, since the Governor-General in the discretionary sphere had to obey the directions of the former. The J.P.C. Report also thought (paragraph 299) that only a continuation of recruitment to the Indian Medical Service by the Secretary of State would meet the requirements of War Reserve and of the European members of the civil services. The White Paper proposed that at the end of five years there should be an enquiry into the question of future recruitment to the I.C.S., and the I.P.S. Clause 251 of the Government of India Bill provided that His Majesty in Council may transfer to such Authority as may be specified in the Order all or any of the powers conferred on the Secretary of State with respect to be making of appointments. In the nature of things constitutional changes must react upon service conditions in the future and that reaction must at some time in the future involve an enquiry. Clause 251 of the Bill was dropped in the Committee stage due to Conservative opposition. The phraseology of S. 244 may be contrasted with that of S. 245. Under the former section the Secretary of State is bound to continue recruitment to the I.C.S., I.M.S., and the I.P.S. Under S. 245 it is left to the discretion of the Secretary of State whether recruitment to the I.I.S., should be continued or not. The Lee Commission suggested that the Irrigation and Forest Services should be forty per cent British. The Simon Commission though it felt strongly on the matter explicitly refrained from making a recommendation. S. 246 deals with posts reserved for persons recruited by the Secretary of State for India. Appointments to such posts are made by the Governor-General or Governor as the case may be exercising individual judgment. They cannot be kept vacant for more than three months or filled by non-I.C.S., men etc., without the sanction of the Secretary of State for India. The

listed posts are set out in the Third Schedule to the Government of India Act 1915. See Classification etc., Rules Nos. 25 and 27.

Rules made under S. 246 are by sub-section (3) of that section unalterable by the Indian Legislature. See also S. 110 (*b*) (ii). S. 247 deals with the conditions of service etc., of persons appointed by the Secretary of State for India. Under S. 276 existing rules made by the Secretary of State in Council are continued and S. 250 gives power to the Secretary of State to make rules governing the conditions of service of officers appointed by the Secretary of State in Council before 1-4-37. In regard to I.C.S., and I.P.S., men the power of the Federal and Provincial Governments to prescribe their conditions of service is nominal merely. It does not in any event extend to prescribing pay, leave, pensions or medical attendance ; and even in regard to other matters can exist only in so far as the Secretary of State has not chosen to make rules. These rules framed by the Secretary of State cannot give to such a person less favourable terms as respects remuneration or pension than the rules which were in force on the date of his first appointment. Promotions, leave for periods of not less than 3 months, suspension etc., of members of these services are made by the Governor-General and Governors exercising their individual judgment. The salaries and allowances of the members of these services are non-votable items in the budget. The India Provisional Constitution (Amendment) Order 1948 (*Gazette of India Extraordinary* 5-2-48) has in S. 247 (*b*) (i) substituted the word " remuneration " for the word " pay " and has added a proviso in the following terms :— " Provided that no rule made under this section shall have effect so as to give to any of the persons aforesaid less favourable terms as respects remuneration, leave, or pension, or less rights as respects disciplinary matters than were given to him by the rules in force immediately before the establishment of the Dominion." An explanation has also been added to the section in the following terms:— " In this section " remuneration " includes leave, pay, allowances and the cost of any privileges or facilities provided in kind ". To make doubly sure that the persons recruited by the Secretary of State receive their pensions the following sections have been inserted : 12 (1) (*d*), 14, 157, 247 (5). If the Governor-General wants to obtain money in an emergency he may act under sections 43 or 44. S. 248 deals with the rights of appeal, complaint, etc., possessed by persons recruited by the Secretary of State for India. Such persons can complain against any orders which affect their conditions of service, or which punish or formally censure them to the Governor-General or Governor who shall pass orders on such complaints exercising individual judgment. A further right of appeal to the Secretary of State is given to the aggrieved person by the same section. See Classification etc., Rules, Nos. 56, 57 and 58. S. 249 deals with the compensation to be paid to a person appointed by the Secretary of State whose

conditions of service are adversely affected by reason of anything done under the 1935 Act. When the Reforms of 1919 were introduced officers in the following All-India Services were permitted to retire on proportionate pension provided they were not permanently employed directly under the Governor-General in Council: I.C.S., I.P.S., I.F.S., I.E.S., I.Ag.S., I.S.E., I.M.S., I.V.S., I.Ar.S., See Home Department Notification dated 1st March, 1924. In exercising the wide and unfettered discretion conferred on the Secretary of State to award compensation to members of services appointed by him he and his advisers may be trusted to preserve a reasonable balance between the interests of the Services on the one hand, and those of the Indian revenues on the other. See J.P.C. Report paragraphs 285 and 286. S. 250 applies Ss. 246 to 249 to persons appointed by the Secretary of State for India before 1-4-37. S. 251 deals with the staff of the High Commissioner for India and the Auditor of Indian Home Accounts. Because the department of the Auditor of Indian Home Accounts will be doing work outside the work connected with the departments of the responsible ministers in India it is provided that appointments to the staff of that department should be made by the Governor-General in his discretion, who also makes rules governing the conditions of their service in his discretion. S. 252 continues the tenure of existing members of the staff of the High Commissioner for India and the Auditor of Indian Home Accounts subject to like conditions of service as respects remuneration, pension etc., as they were enjoying before. S. 253 excludes the application of the provisions of Chapter 2 of Part 10 of the Act (Ss. 240 to 263), in the case of Federal Court and High Court judges. Pensions payable to High Court judges (whether in India or in Burma) who retired before 1-4-37 shall continue to be payable. Appointments, postings and promotions of district judges are by S. 254 made by the Governor exercising his individual judgment after consulting the views of the High Court. Direct recruitment of a person to the post of district judge cannot be made unless he is a barrister, pleader, etc., of at least five years' standing and he has been recommended by the High Court for appointment. The same rule also applies to the recruitment of Chief Judge, Small Cause Court and Chief Presidency Magistrate. S. 255 deals with the recruitment of the subordinate civil judiciary. Under S. 7 of the Madras Civil Courts Act 1873 the recruitment of district munsifs in Madras was before 1-4-37 vested in the High Court. In some other provinces the power of appointment was vested in the Provincial Governments. After 1-4-37 the position is uniform in all provinces and the High Court has no longer the power of appointing district munsifs. The minister now is informed of the candidates for the posts selected by the Public Service Commission and the appointment is made by the Governor on the minister's recommendation in accordance with any rule of communal pro-

portions in force in that particular province. The powers of the High Courts in regard to the appointment etc., of district munsifs and subordinate judges are hereafter confined to being consulted along with the Public Service Commission in the matter of making rules prescribing the qualifications requisite for appointment to these posts. Promotions, leave, postings of district munsifs and subordinate judges are still made by the High Court. The posts of Chief Judge, Small Cause Court and Chief Presidency Magistrate were added in the Committee stage. The powers conferred by S. 255 on the Governor are exercised by him on ministerial advice. *Quaere* : Is the post of City Civil Judge, Madras a post ' inferior to the post of district judge ' so as to make the section applicable to it ? Or does S. 254 govern that post ? S. 256 lays down that recommendations for granting, enhancing or withdrawing magisterial powers shall not be made except after consultation with the district magistrate or Chief Presidency Magistrate. In *Biswanatha Khemka* v. *King Emperor* (1945) F.L.J. 103 (F.C.) the services of a magistrate were borrowed from another province and on these being placed at the disposal of the Bengal Government he was appointed Additional Presidency Magistrate at Calcutta. On a contention that his appointment was made without consulting the Chief Presidency Magistrate, Calcutta and was therefore ineffective, held that in the circumstances the consultation should have been made with the district magistrate of the district in which the magistrate concerned was working in his own province when the question of his appointment came under consideration and in the absence of anything to show that such consultation did not take place it could not be contended that the direction contained in S. 256 had not been complied with. Non-compliance with the direction laid down in S. 256 would not render an appointment otherwise regularly and validly made ineffective or inoperative because the section was directory and not mandatory. S. 257 exempts officers of the Political Department from the application of the provisions of Part 10 of the Act. S. 258 deals with the abolition etc., of certain posts. Posts which immediately before 1-4-37 were Central Service Class I and Class II posts, Railway Service Class I and Class II posts, and provincial service posts cannot be abolished except by the Governor-General or Governor as the case may be exercising individual judgment. Rules or orders affecting adversely the pay, allowances etc., of members of Central Service Class I or Railway Service Class I or a provincial service appointed before the coming into force of Part 10 of the Act cannot be made by any person other than the Governor-General or the Governor as the case may be exercising individual judgment. A similar rule applies to memorials submitted by these persons, and also to persons recruited by the Secretary of State for India or the Secretary of State for India in Council and persons serving in His Majesty's Forces,

S. 259 deals with the salary and allowances of a person appointed before 1-4-24 otherwise than by the Secretary of State for India in Council to a post which has between that date and the coming into force of Part 10 of the Act been classified as a superior post and lays down that they shall be charged on the revenues of the federation or of the province as the case may be. If he is serving in the railway department so much only of such amount as is not paid out of the railway fund shall be charged on the revenues of the federation. A similar rule applies also to the pensions of such persons and also to persons who retired before 1-4-24 after holding posts which as from that date have been classified as superior posts. S. 260 deals with the pensions payable to persons who have retired before 1-4-37. If they would have been payable by a province if this Act had not been passed, they continue to be payable by the corresponding province, or else they are payable out of the revenues of the federation. Pensions of persons who retired before 1-4-37 having served in Burma or Aden, from an All-India Service or Central Service Classes I or II or Railway Service Classes I or II are payable out of the revenues of the federation. S. 261 lays down that the powers conferred on the Secretary of State for India by Chapters 2 to 5 of Part 10 of the 1935 Act shall not be exercisable by him except with the concurrence of his Advisers. The Secretary of State is not bound to consult his advisers or to follow their advice except in regard to service matters. See S. 278 (6) *post*. See also S. 96-E of the Government of India Act, 1919. The Governor-General or Governor may declare that the Ruler or subject of a Federated State or any native of a specified tribal area or territory adjacent to India shall be eligible to hold any civil office in connection with the affairs of the federation or of the province as the case may be. Otherwise the general rule is that no person who is not a British subject shall be eligible to hold any office under the Crown in India. This does not prohibit the temporary employment of persons who are not British subjects. The declarations made by the Governor-General or Governor under this section are made by them exercising individual judgment. S. 262 was amended by the India and Burma (Miscellaneous Amendments) Act 1940. In sub-sections (1) and (2) for the words ' subject ' and ' native ' the words ' subjects or any named subject ' and ' natives or any named native ' were substituted. Sub-section (4) was amended so as to exempt persons in the permanent civil service in India on 31st March 1940 from the operation of the disqualification imposed by the sub-section. The proviso to sub-section (4) has in mind specialists in some particular job, especially people like archæologists and foreign scientists who are experts in specific and tropical diseases, who belong to an international body. See also paragraph 15 of the Government of India (Commencement etc.,) Order 1936.

S. 263 facilitates the creation or maintenance of services common to the Federation and one or more provinces on the basis of an agreement between the Federation and the provinces concerned.

(2-a.) Amendments to Ss. 240 to 263 : The India (Provisional Constitution) Order 1947 has made the following amendments :—

Ss. 232-239 : Omit.

Ss. 240 : In sub-section (2), after " aforesaid " insert—" who having been appointed by the Secretary of State or the Secretary of State in Council continues after the establishment of the Dominion to serve under the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to the Governor-General or the Governor according as that person is serving in connection with the affairs of the Dominion or of a Province, and no other such person as aforesaid."

S. 241 : In sub-section (1), omit " after the commencement of Part III of this Act."

In sub-sections (2) to (5), omit " in India."

In sub-section (3), in paragraph (*a*), for " some person empowered by the Secretary of State to give directions in that respect" substitute " the Governor-General or the Governor as the case may be," and in paragraph (*b*), for " Secretary of State or by some person empowered by the Secretary of State to give directions in that respect " substitute " Governor-General or the Governor as the case may be."

S. 242 : Omit sub-sections (1) and (2).

In sub-section (3), after " to posts in the " insert " railway ".

Ss. 244-246 : Omit.

S. 247 : For this section, substitute—

" 247. *Conditions of service of persons originally recruited by Secretary of State.*—The conditions of service of all persons who, having been appointed by the Secretary of State or the Secretary of State in Council to a civil service of the Crown in India, continue on and after the date of the establishment of the Dominion to serve under the Government of the Dominion or of any Province, shall—

(*a*) as respects persons serving in connection with the affairs of the Dominion, be such as may be prescribed by rules made by the Governor-General ;

(*b*) as respects persons serving in connection with the affairs of a Province—

(i) in regard to their pay, leave, pensions, general rights as to medical attendance and any other matter which immediately before the establishment of the Dominion was regulated by rules made by the Secretary of State, be such as may be prescribed by rules made by the Governor-General ; and

(ii) in regard to any other matter, be such as may be prescribed by rules made by the Governor of the Province."

Ss. 248–252 : Omit.

S. 253 : In sub-section (1), for " Orders in Council " substitute " orders of the Governor-General," and for " His Majesty " substitute " the Governor-General."

In sub-section (2), after " meaning of this Act " insert " as originally enacted."

Omit sub-section (3).

Ss. 257–259 : Omit.

S. 260 : For the words from " commencement of Part III " to the end of the sub-section substitute " establishment of the Dominion shall, if it would have been payable by the Government of any Province if the Indian Independence Act, 1947, had not been passed, be paid out of the revenues of that Province or, if that Province has ceased to exist, of such new Province as may be determined by orders made under that Act, and in any other case shall be paid out of the revenues of the Dominion of India or of Pakistan as may be so determined."

S. 261 : Omit.

S. 262 : Omit sub-sections (3) and (5).

In paragraph (*a*) of the proviso to sub-section (4), for " is in the permanent service of the Crown in India " substitute " was in the permanent service of the Crown in India (within the meaning of this Act as originally enacted)."

(3) Defence Services and Chaplains : (Ss. 232 to 239 and 269) : By S. 232 the pay, allowances, conditions of service of the Commander-in-Chief of His Majesty's Forces in India shall be fixed by His Majesty in Council. This section comes into force only after the establishment of federation. See Commencement and Transitory Provisions Order 1936 paragraph 3 (2). S. 233 empowers His Majesty in Council to require that specified appointments connected with Defence shall be made by him or in such manner as he may direct. This section does not derogate from any power vested in His Majesty by virtue of any Act or Royal Prerogative. By the Defence Appointments Order 1936 the following appointments connected with defence are to be made by His Majesty : Royal Indian Navy : (Flag Officer Commanding) ; Army : (General Officers Commanding in Chief) (Chief of the General Staff) (Adjutant-General) (Quartermaster-General) (Master General of the Ordnance) (Officers Commanding Districts). By S. 234 the power of His Majesty to grant commissions in any naval, military, or air force raised in India extends to the granting of commissions in any such force to any person who has been lawfully enlisted in that force i.e., commissions may be granted in the Indian Army even to subjects of Indian States or of territories adjacent to India. See S. 8 (1) proviso. While S. 8 (1) proviso deals with

the appointment of subjects of Indian States and of territories adjacent to India, like Nepalese subjects etc., to noncommissioned ranks the combined effect of S. 8 (1) proviso and of S. 234 is to make such subjects eligible to obtain commissions in the armed forces of India. By S. 235 the Secretary of State for India with the concurrence of his advisers may specify what regulations etc., affecting the conditions of service of His Majesty's Forces in India shall be made only with his previous approval. This section gives the Secretary of State for India a certain measure of control over the conditions of service of members of the Defence Services in India. By S. 236 rights which members of His Majesty's Forces in India enjoyed immediately before 2-8-35 in respect of appeals to the Secretary of State or the Secretary of State in Council are not affected by the 1935 Act and the Secretary of State may entertain memorials from members of these forces. S. 237 makes the pay, allowances pensions etc., of members of His Majesty's Forces in India a non-votable item of the budget. They can however be discussed. The benefit of the preceding sections is also conferred on civilian personnel attached to defence services (that is persons who hold or have held posts in India connected with the equipment or administration of the defence forces or otherwise connected with defence) by S. 238; that is the pay, allowances etc., of these persons are also non-votable. In the appointment of officers to the Indian army the same provision as heretofore or equal provision shall be made for the appointment of sons of persons who have served in India (or in Burma or Aden before their respective separation from India) in the military or civil service of the Crown in India (S. 239). S. 269 makes the provisions of Chapter 2 of part 10 of the 1935 Act applicable with necessary modifications to the establishment of Chaplains who minister in India and are to be appointed by the Secretary of State. Two members of the establishment of Chaplains in Bengal, Madras, and Bombay must always be Ministers of the Church of Scotland and are entitled to such salaries out of the revenues of the Federation as are allotted to military Chaplains in those provinces. These Ministers must be ordained and inducted by the Presbytery of Edinburgh and shall be subject to the spiritual jurisdiction of the Presbytery of Edinburgh with a right of appeal to the Provincial Synod of Lothian and Tweeddale and to the General Assembly of the Church of Scotland. Ss. 232 to 239 and S. 269 have been omitted by the India Provisional Constitution Order 1947. See the Indian Church Act 1927 (17 and 18 Geo. V, C. 40). The Ecclesiastical Department expenditure cannot go beyond 42 lakhs of rupees in any year. See S. 33 (3) (*e*) of the 1935 Act as also S. 122 (1) and (2) of the Government of India Act 1915.

(4) **Public Services Commissions (Ss. 264 to 268) :** A Central Public Service Commission for the All-India and higher services was set up in 1926. In Madras a provincial commission was set

up in 1930. Punjab passed the necessary legislation but abandoned the scheme owing to lack of finance. S. 264 permits the setting up of a joint commission to serve the needs of two or more provinces. The Federal Public Service Commission can also with the approval of the Governor-General serve the needs of a province if requested to do so by the Governor of the Province concerned. By S. 265 the Chairman and Members of the Federal Public Service Commission are appointed by the Governor-General in his discretion and the Chairman and Members of a provincial commission are appointed by the Governor in his discretion. One half of the members must be persons who have held office under the Crown in India for at least ten years.

The number of members of the commission, the tenure of office of members, their conditions of service, their staff etc. are determined by regulations made by the Governor-General or Governor in his discretion as the case may be. The Chairman of a provincial commission on retirement can be appointed as Chairman of another provincial commission or as a member or Chairman of the Federal Commission. The Chairman of the Federal Commission on retirement is not eligible for any further employment under the Crown in India. Members of the Federal and Provincial Commissions also suffer from a similar disability which can be removed by the Governor-General or the Governor as the case may be acting in his discretion. The Federal and Provincial Commissions have a right to be consulted on the following matters : methods of recruitment to civil posts, promotions and transfers from one service to another, disciplinary matters including memorials and petitions, claims by civil servants that costs incurred by them in defending legal proceedings in respect of acts done in execution of duty should be borne by the State, claims for award of pension to civil servant in respect of injury sustained by him. The Commissions have also to advise on other matters referred to them by the Governor-General or Governor in his discretion as the case may be. The Secretary of State, the Governor-General or Governor in his discretion as the case may be, may specifiy matters on which it shall not be necessary to consult the Commissions. The Commissions need not be consulted on the manner in which posts are to be allocated as between various communities.

The function of the Commissions is merely an advisory one. The danger is that if mandatory powers are given to them, that will amount to the setting up two governments in a province and two governments in the Centre and there is everything to be said against a procedure of that kind. S. 267 empowers the Federal and Provincial Legislatures to pass legislation extending the functions of the respective Commissions but such legislation cannot be introduced without the previous sanction of the Governor-General or Governor in his discretion as the case may be. These additional functions cannot be exercised in respect of persons appointed by

the Secretary of State without his consent and in respect of members of the All-India Services without the consent of the Governor-General (where the Act conferring additional functions is a provincial Act). The expenses of the Federal and Provincial Commissions are non-votable items of the Federal and Provincial budgets.

(4-a) Amendments in Ss. 264 to 268 : The India Provisional Constitution Order 1947 has in S. 265 (1) omitted the words ' in India.' In S. 266 (3) the words ' The Secretary of State as respects services and posts to which appointments are made by him ' have been omitted as also the word ' other ' before ' services and posts '. In S. 266 (4) for the words from ' the various communities ' to ' in India ' the following words have been substituted : ' communities or in the case of the subordinate ranks of police forces.' In S. 267 all words after ' Governor' have been omitted and S. 267 has been omitted.

(5) Indemnity for Past Acts etc. (Ss. 270 to 277): S. 270 provides that no proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date except with the consent of the Governor-General in his discretion if he was employed about the affairs of the Government of India or of Burma, or with the consent of the Governor in his discretion if he was employed about the affairs of a province. The relevant date in relation to persons employed about the affairs of a province is 1-4-37, and in relation to persons employed about the affairs of the Federation is the establishment of the Federation. All proceedings whether civil or criminal, and whether instituted before or after the coming into force of Part 10 of the 1935 Act in respect of acts done before the relevant date, above referred to, shall be dismissed unless the court is satisfied that the acts complained of were not done in good faith and the costs of such proceedings if dismissed shall be charged on the revenues of a province where the defendant was employed in connection with the affairs of that province, and on the revenues of the federation in other cases. This is a much-interpreted section and the prolific caselaw which it has given rise to can be conveniently grouped under various headings :

(*a*) *Can the protection given by the section be claimed by officers of the Central Government even though the relevant date has not arrived because federation has not been established ?* A Full Bench of the Lahore High Court in *Bansi Ram Lal* v. *Emperor*, A.I.R. (1944) F.L.J. 41 (H.C.) (F.B.) (Harries, C.J., Blacker and Munir, JJ.), has answered this question in the affirmative. According to the Full Bench, S. 270 (1) applies to prosecutions of railway officials during the transitional period and the consent of the Governor-General is necessary for the institution of such proceedings. S. 313 (3) makes it clear that while the second 'federation' in S. 270 (3) means,

the 'federation', the first 'federation' means "British India". There is nothing in the context which shows that the words ' before the relevant date ' in S. 270 (1) cannot legitimately be paraphrased as at a time when the relevant date has not yet arrived. Digby, J. in *Dave* v. *Emperor* (1944) F.L.J. 250 (H.C.) took a similar view and found nothing absurd if for an indefinite period which might never end, the sanction of the Governor-General were required to prosecute a sweeper who cleaned out a railway carriage and hit a passenger with his broom. He rejected the contention that an act done before the relevant date only attained existence in law after the relevant date had been fixed by proclamation and the contention that if the accused could not name the relevant date he was unable to say or prove that his act was prior to it. In the same case Niyogi, J. took the opposite view, namely, that an act done before the relevant date presupposes the existence of the relevant date. The same view was taken in *In re Sannayya* (1940) 2 M.L.J. 564.

(*b*) '*Act done or purporting to be done in the execution of duty.*' This clause has been the subject of much judicial interpretation and has given rise to many brain teasers. In *Maharani Gurucharan Kuar* v. *Province of Madras* (1944) F.L.J. 115 (F.C.) a Sub-Inspector of Police was asked by his superior to prevent the Ex-Maharaja of Nabha from boarding the Trivandrum Express train at Kodaikanal Railway Station. The Sub-Inspector mistakenly thought the direction related to the Maharani and prevented her and her minor daughter from boarding the train at that station. Held by Spens, C.J. and Varadachariar, J. that the act was one purporting to be done in the execution of duty and hence the consent of the Governor was necessary before the Maharani could sue for damages for false imprisonment. The section also covers acts not justified or authorised by law. Otherwise the section would be rendered nugatory. Zafrulla Khan, J. in the above case took the opposite view and held that the mistake occurred not in the execution of what the Sub-Inspector had correctly understood to be his duty, but in his imagining that a direction had been issued concerning the Maharani when in fact it had been issued concerning the Ex-Maharaja. Hence the protection afforded by the section could not be claimed. Any other view would amount to putting a premium upon official high handedness and would reduce the right of the subject to security of life and limb, liberty and the peaceful enjoyment of property to a mockery. In *Dave* v. *Emperor* (1944) F.L.J. 250 (H.C.) a signaller under the instructions of the Assistant Station Master operated the block instrument though it was not his duty to do so and an accident occurred and the signaller claimed the protection of the section when proceedings were instituted against him. Niyogi and Sen, JJ. held that the signaller could claim the protection of the section because he was not an unauthorised person operating the electrical slide instrument. Digby, J. took a

different view in the same case and held that he was performing an unauthorised act and could not claim the protection of the section. The act of receiving illegal gratification is not an act done or purporting to be done in the execution of official duty and hence a person guilty of such an act cannot claim the protection afforded by S. 270 (1)—*Balakrishna Murlidhar* v. *Emperor* (1947) N.L.J. 310. In *Albert West Meads* v. *The King*, A.I.R. (1948) P.C. 156 Major Meads of the Royal Engineers fraudulently misapplied Rs. 8,089-7-0 being the imprest money of the Company commanded by him. The Privy Council held that no sanction under S. 270 (1) was necessary for court martial proceedings which were not civil or criminal proceedings to which alone S. 270 (1) applied. Sub-section (2) of S. 270 with its reference to the court and recovery of 'costs' is apposite enough to proceedings before the ordinary civil and criminal courts but is hardly apposite to proceedings by court martial. Even though the phrase 'civil or criminal proceedings' possibly in other contexts may be capable of including military offences under the Army Act or proceedings by court martial, they do not bear that meaning in the context of S. 270 (1). The Privy Council affirmed the judgment of the Federal Court in (1944) F.L.J. 265 (F.C.). That receiving illegal gratification is not an official act is laid down also in *Lt. Hector Thomas Huntley* v. *King-Emperor* (1944) F.L.J. 167 (F.C.) and *Suraj Prakash* v. *King-Emperor* (1945) F.L.J. 44 (F.C.). (Offence under Ss. 408 and 409 of the Indian Penal Code in the latter case). In *H. H. B. Gill* v. *Emperor* (1946) F.L.J. 112 (F.C.) there was a complaint against an Army Officer *G* and a contractor *L* to cheat the Government of India. The sanction of the Governor-General acting in his discretion had been obtained to the institution of criminal proceedings against *G* for offences under S. 161 and S. 120-B read with S. 420 of the Indian Penal Code. Held by the Federal Court that the mere fact that at the stage of framing charges against the accused the magistrate had thought fit to frame charges under S. 120-B read with S. 161 instead of under S. 161 and S. 120-B read with S. 420, would not render the sanction already given nugatory, and invalidate the magistrate's action in taking cognisance of the offence set out in the sanction. Further no consent under S. 270 (1) was required inasmuch as the agreement by a public servant to receive illegal gratification and the receipt of such gratification by him could not be said to be acts done or purporting to be done in the execution of duty. A police Sub-Inspector was charged by a district magistrate with offences under Ss. 120-B, 193, 211, and 220 of the Indian Penal Code and the complaint was filed under S. 476, Criminal Procedure Code. It was alleged that the police officer had instigated a person to file a false complaint of theft against an innocent person and upon such complaint being filed the police officer arrested and confined the innocent person. Afterwards the District Magistrate held an enquiry and instituted criminal

proceedings against the police officer. Held on the above facts by the Sind Chief Court in *Nandiram Fatechand* v. *Emperor*, A.I.R. (1948) Sind 114 that S. 270 had no application because it could not be said that the police officer was acting or purporting to act in the discharge of his duty. A telegraph messenger while on duty rode a bicycle belonging to Government which had a defective brake and no bell and knocked down a small girl. He was prosecuted under S. 337, I.P.C. Held the act of the accused was an act purporting to be done in the execution of his duty and sanction under S. 270 (3) was necessary for the prosecution—*Shyama Rao Krishna Rao* v. *Emperor*, A.I.R. (1948) Nag. 274[60].

S. 271 lays down that bills which seek to abolish or restrict the protection afforded to public servants by S. 197 of the Criminal Procedure Code and by Ss. 80 to 82 of the Civil Procedure Code cannot be moved in the Federal or Provincial legislatures without the previous sanction of the Governor-General in his discretion, or the Governor in his discretion as the case may be. The power of sanctioning prosecutions under S. 197, Criminal Procedure Code is exercised in the case of persons employed about the affairs of the federation by the Governor-General exercising his individual judgment, and in the case of persons employed about the affairs of a province, by the Governor exercising his individual judgment. The costs and damages awarded in a suit against a public servant in respect of an act purporting to be done by him in his official capacity and ordered to be paid by him, shall if the Governor-General or Governor as the case may be exercising individual judgment so directs, be defrayed out of and charged on the revenues of the federation or of the province as the case may be. The question as to who will come under the class of public servants who can be removed from their office only by some authority higher than the Provincial Government and who are mentioned in S. 197, Cr. P.C. came up for discussion in *M. L. Bannerjea* v. *Emperor* (1944) F.L.J. 276 (F.C.). The Federal Court held in that case that a Goods and Yard Supervisor who held a Commission as Second Lieutenant and a Shed Inspector who was a Warrant Officer, who were subordinate to the Chief Transportation Manager and the Chief Commercial Manager who could jointly dismiss them, did not come within the above description because to construe the expression ' authority higher than a Provincial Government ' to include any officer of the Central Government would lead to patent absurdities. The expression had reference only to the Central Government, the

---

60. Accused entrusted with duty of allotting trucks to various military departments for their use—accused falsely entered in the duty slips some bogus military work and hired out the lorries to private contractors for their own work—accused cannot be deemed to be acting or purporting to act in the discharge of official duty and sanction under S. 270 is not necessary—when a public servant commits a breach of trust he is not doing an act. *In re Doraiswami Iyer* (1948) 2 M.L.J. 116.

Governor-General and the Secretary of State. The G.H.Q. (whatever that expression might mean) would not come under it.[61] By S. 272 pensions payable to persons who before 1-4-37 had served in India, Burma or Aden etc., or to persons serving in His Majesty's forces in India as officers, or appointed to a civil post in India by the Secretary of State or by His Majesty, or holding a reserved post, are exempt from taxation under existing Indian, Federal, or provincial laws if the persons reside permanently outside India and the pensions are paid in accordance with arrangements made with the Secretary of State. S. 273 deals with four funds namely, the Indian Military Widows and Orphans Fund, the Superior Services (India) Family Pension Fund, Fund formed out of moneys contributed under the Indian Military Service Family Pension Regulations, Fund formed out of moneys contributed under the Indian Civil Service Family Pension Rules. His Majesty may by Order in Council provide for the vesting in Commissioners to be appointed under the Order of these funds and also provide for the investment of the said funds, their administration by the Secretary of State, remuneration to be paid to the Commissioners and other incidental matters. S. 273 (2) provides that the balance in the hands of the Governor-General on 31st March 1936 in respect of the above four funds shall be transferred to the commissioners before the expiration of three years from the said date either at one time or by instalments together with such interest as may be prescribed by the said Order. His Majesty may by Order in Council extend the period of three years. Sub-section (3) provides for the lodging of objections by existing subscribers and beneficiaries. The money in the hands of the Governor-General representing the interest of the objector is not transferred to the commissioners but is dealt with as part of the revenues of the federation. Interest or dividends received by the Commissioners on sums forming part of any fund vested in them under S. 273 are exempt from income-tax in the United Kingdom and from estate duty in the United Kingdom and in Northern Ireland if the Parliament of that country so provides. S. 273 also applies to persons who before 1-4-37 were serving in India Burma or Aden and after that date continue to serve in Burma or Aden. S. 273 has been enacted to allay the apprehensions felt by the contributors and pensioners of the above four funds regarding the willingness or ability of the Indian Government to meet the obligations in their favour. There is a transfer of these funds to London there to be under the control of Commissioners to be appointed in manner provided by Order in Council and of the Secretary of State. An option

---

61. *Afzalur Rahman* v. *Emperor* (1943) F.L.J. 7 (F.C.) holding that a police officer who can be dismissed only by the Deputy Inspector-General of Police is not a 'person not removable from his office save by or with the sanction of the Provincial Government' within the meaning of S. 197, Criminal Procedure Code.

is however reserved to individual pensioners or contributors to retain the funds in India. The option under the Government of India (Family Pensions) Order 1936 is exercisable until 1-4-37 unless the Secretary of State thinks it right to extend the time in any particular case. By the India and Burma Miscellaneous Amendments Act 1940 in Sub-section (2) and (3) (*a*), for " Governor-General " ' Secretary of State in Council ' was substituted. In sub-section (2) for the words ' Thirty-first day of March next etc., ' Thirty-first March 1937 ' was substituted. In sub-section (2) and the proviso to sub-section (2) for the words ' three years ', ' two years ' were substituted. The interest which the Government of India pays on these is five per cent per annum while if the funds were transferred to England and invested in trustee securities they would fetch barely half that rate. The transfer has to be completed before April 1939. See Government of India (Family Pensions Fund) Order 1936. The India Military Funds Act 1866, the East India Annuity Funds Act 1874, and the Bombay Civil Fund Act 1882, by S. 274 continue to have effect with the " Secretary of State " substituted for " Secretary of State in Council " and with " revenues of the federation " substituted for " Revenues of India." By S. 275 sex is not to disqualify a person for appointment to civil posts other than such posts as are specified by any general or special order made by the Secretary of State or Governor-General or Governor as the case may be. S. 276 continues the existing rules relating to civil services under the Crown in India until other provision is made under the appropriate provisions of the 1935 Act, so far as they are consistent with the 1935 Act and they shall be deemed to be rules made under the appropriate provisions of the 1935 Act. S. 250 gives to the Secretary of State power to frame rules regarding the conditions of service of persons appointed by the Secretary of State in Council before 1-4-37, and applies the provisions of Ss. 246 to 249 to such persons. Such persons can also elect to be governed by the rules in force before 1-4-37 if they think that those rules would be more favourable to them even if new rules have been framed under S. 250. S. 277 deals with interpretation of terms like "All-India Service," "Central Service Class I ", etc.

(6) **Amendments in Ss. 270 to 277:** The India Provisional Constitution Order 1947 has omitted S. 270, S. 271 (2), Ss. 272, 273, 274, S. 275 paragraph (*c*), S. 277 sub-sections (2) and (3). In S. 271 (2) for the words 'Indian Code of Criminal Procedure' the words ' Code of Criminal Procedure 1898 ' have been substituted, and for ' Indian Code of Civil Procedure ' the ' Code of Civil Procedure 1908 ' has been substituted and the words ' either chamber of ' have been omitted. In S. 271 (3) for ' Indian Code of Civil Procedure' the ' Code of Civil Procedure 1908 ' has been substituted.

CHAPTER XIV

MISCELLANEOUS PROVISIONS

(Ss. 1 to 6 and 285 to 321 and Schedules)

(1) Introductory & Federation of India (Ss. 1 to 6) : (*a*) *Introductory :* The 1935 Act has no preamble and the term ' dominion status ' has been scrupulously avoided but in order to meet the wishes of the Labour Members of Parliament who insisted that some reference to dominion status should be included Sir Samuel Hoare the Secretary of State for India was willing to retain the preamble to the 1919 Act while repealing the rest of that enactment. This procedure has been described by Professor Keith as preserving the smile of a Cheshire cat after its disappearance and as a veritable legislative monstrosity. By S. 2 all rights authority and jurisdiction heretofore belonging to His Majesty the King-Emperor are exercisable by His Majesty except in so far as may be otherwise provided by or under the 1935 Act. This section is necessitated by the fact that under the federal scheme of 1935 the centre and the provinces will each within its own sphere be sovereign and hence the basis of the 1935 Act is the resumption of all existing power by the Crown and its allocation between the centre and the provinces. All power not so allocated inheres to the Crown. See *Bhadwa Taluk* v. *Crown* and as to prerogatives p. 2 *ante*, Chapter I. By S. 3 the offices of the Viceroy and of the Governor-General have been separated and a new name has been given to the former namely Crown Representative. This separation was effected to meet the wishes of the Princes who objected to the exercise of the functions of the Crown in relation to the States by the Viceroy who was an authority amenable to the influence of the Indian Legislature and the Government of India. Both offices may be held by the same person. Both are appointed by His Majesty by Commission under the Royal Sign Manual. S. 4 lays down that the Commander-in-Chief of India shall be appointed by Warrant under the Royal Sign Manual.

(*b*) *Amendments in Ss.* 1 *to* 4 *:* S. 2 has been omitted by the India Provisional Constitution Order 1947 which has substituted the following section for S. 3. 'The Governor-General.—The Governor-General of India is appointed by His Majesty by a commission under the Royal Sign Manual.' S. 4 has been omitted.

(*c*) *Salaries of Governor-General and Governors :* Before 15-8-47 the 3rd Schedule of the 1935 Act fixed the annual salaries (in rupees) of these persons as follows : Governor-General : 250,800 ; Governors of Madras, Bombay, Bengal and U.P. : 120,000 ; Governors of

Punjab and Bihar : 100,000 ; Governor of C. P : 72,000 ; Governors of Assam, Frontier Province, Orissa and Sind : 66,000.

The India Provisional Constitution Order 1947 has left the Governor-General's salary untouched and fixed a uniform salary of Rs. 66,000 per year for all provincial governors. Formerly the allowances made to the Governor-General and the Governors for expenses in respect of equipment and travelling etc., were fixed by His Majesty in Council and now they are fixed by the dominion law as respects the Governor-General and by the Governor-General as respects the Governors. A similar rule applies to the leave allowances of the above persons, as also to customs privileges which may be granted to them. After para. 6 a new para. has been inserted which preserves to the Governor-General the same allowances etc., to which he was entitled to immediately before 15-8-47 until a dominion law otherwise provides.

(*d*) *Federation of India :* By S. 5 on addresses presented to His Majesty by each House of Parliament it shall be lawful for His Majesty to declare by proclamation that as from the date appointed therein there shall be a federation of India consisting of the Governors' provinces and such states as have acceded to the federation and Chief Commissioners' provinces shall also be included in the federation. It is a condition precedent to the establishment of federation that rulers of states which are entitled to choose not less than 52 members of the federal upper house and the aggregate population of which amounts at least to one half of the total population of all the states should accede to the federation. After all the states contribute something towards the customs revenues of India and it is not unreasonable that they should claim a share in the governance of India. S. 6 deals with the important topic of instruments of accession of states. An instrument of accession shall specify the matters which the Ruler accepts as matters with respect to which the federal legislature may make laws for his state. The Ruler has also to assume the obligation of ensuring that due effect is given within his state to the provisions of the 1935 Act so far as they are applicable therein by virtue of the Instrument of Accession. It shall be a term of every Instrument of Accession that the provisions of the 1935 Act mentioned in the 2nd Schedule may be amended by Parliament without affecting the Instrument of Accession of the State. As regards Part III the whole of it except those provisions relating to states can be amended without affecting the Instrument of Accession. As regards Part II the special responsibilities of the Governor-General cannot be tampered with except those relating to minorities and services and prevention of discrimination against United Kingdom subjects. The reserved half of the federal government and the powers of the Governor-General in his individual judgment and in his discretion are immune from change. The

composition procedure and restrictions on the powers of the federal legislature cannot be altered ; neither can the sections dealing with the Federal Court or the Federal Railway Authority be tampered with. The Princes are thus given a veto over the future constitutional progress of India. The India Provisional Constitution Order 1947 has omitted the 2nd Schedule. After 20 years from the establishment of Federation states shall not be admitted to it unless both chambers of the Federal legislature present an address to His Majesty praying that the state be admitted. The India Provisional Constitution Order 1947, provides that the dominion of India shall consist of the Governor's provinces, Chief Commissioners' provinces, acceding states and any other areas that may with the consent of the dominion be included in the dominion. This change has been effected by substituting a new S. 5 for the old section. A new sub-section (6) has been substituted for the old S. 6 and it has made the following changes : ' dominion ' has been substituted for ' federal ' and 'Governor-General' for ' His Majesty '. Sub-section (1) proviso has been omitted. For 'his state' 'the state' has been substituted. Sub-sections (4) and (5) have been omitted. The first three lines of sub-section (6) have been omitted and sub-section (6) is renumbered as sub-section (4). Sub-section (7) has been omitted. Sub-sections (8) and (9) have been renumbered as sub-sections (5) and (6). ' Dominion Legislature ' has been substituted for ' Parliament.'

(2) The Crown and the Indian States : S. 285 lays down that the rights and obligations of the Crown in relation to Indian states are not affected by the 1935 Act subject of course to the Instrument of Accession executed by the States. By S. 286 if the Crown Representative for the discharge of the functions of the Crown in relation to Indian states requires the assistance of armed forces he shall make a request for those forces to the Governor-General who shall supply them in the exercise of the executive authority of the federation and such expenses shall be deemed to be Crown Representative expenses. S. 287 permits arrangements to be made for Governors and provincial staff to assist the Crown Representative in discharing the functions of the Political Department. Ss. 285 to 287 have been omitted by the India Provisional Constitution Order: 1947.

(3) Aden (S. 288) See *ante* Chapter 8.

(4) Creation of New Provinces Etc. (Ss. 289 and 290) : S. 289 provides for the creation of the new provinces of Sind and Orissa. Orissa has been carved out of the former province of Bihar and Orissa with areas from Madras Province and the Central Provinces thrown in. S. 290 provides procedure for the creation of new provinces. His Majesty may by order in council create a new province, increase the area of any province diminish the area of any province, or alter the boundaries of any province. Before

laying the draft of any such order before Parliament the Secretary of State shall ascertain the views of the Federal Government and the Federal Legislature and of the Government and Legislature of any province which will be affected by the order. Such order may make provision for varying the representation in the federal legislature of the province whose boundaries are altered, and for varying the composition of the legislature of any such province, for apportionment of assets and liabilities and other incidental and consequential provisions. The total membership of either chamber of the federal legislature cannot be varied and 'province' is defined for the purposes of the section as meaning a governor's or Chief Commissioner's province. S. 289 has been omitted by the India Provisional Constitution Order 1947 which has substituted in S. 290 (1) the words ' the Governor-General may by order ' and ' before making any such order the Governor-General shall ascertain the views of the Government ' for the words ' His Majesty may by Order in Council' and from ' before the draft ' to ' chamber or chambers of the legislature ' respectively. For sub-section (2) a new sub-section has been substituted which also provides for constituting the legislature of a new governor's province when it is created.

(5) **Franchise (S. 219) :** S. 291 lays down that in so far as provision is not made by the 1935 Act His Majesty in Council may make provision with respect to the following matters, namely :—delimitation of territorial constituencies, qualifications of voters and candidates for election, filling of casual vacancies, conduct of elections and methods of voting, election expenses, corrupt practices at elections, hearing of election petitions and other ancillary matters. See the Government of India (Provincial Legislative Assemblies) Order 1936, Government of India (Provincial Legislative Councils) Order 1936, and the Government of India (Provincial Election Corrupt Practices and Election Petitions) Order 1936. The India Provisional Constitution Order 1947 has in S. 291 substituted ' in relation to any provincial legislature provision may be made by Act of that legislature ' for the words ' His Majesty in Council may from time to time to make provision.'

Under the English Representation of the People Act 1918 every male above 21 years of age who is a British subject and who is not an alien or a lunatic or an idiot or a traitor of felon etc., is entitled to vote at Parliamentary elections. To be registered on the register of voters a man must have either the requisite residence qualification or the requisite business premises qualification. Under the Representation of the People Act 1928 the vote was given also to women in the United Kingdom, see Jennings '*Parliament must be Reformed*' pp. 28–31. Every candidate must deposit £150 and he forfeits the deposit if he does not secure at least

one-eighth of the votes polled in the case of a single or two member constituency and one-eighth of the votes polled divided by the number of members to be elected in the case of constituencies returning more than two members.

(6) Provisions as to certain Legal Matters (Ss. 292 to 301): (*a*) *General* (*Ss.* 292, 293, 301) : S. 292 continues the existing Indian laws in force in British India before 1-4-37 and S. 293 provides for the adaptation of existing Indian laws by Order in Council. S. 18 of the East India Company Act 1870 and S. 12 of the East India Act 1797 (being obsolete enactments containing savings for native law and custom) are repealed. Ss. 292 and 293 have been omitted by the India Provisional Constitution Order 1947. Any bye-law made under a repealed statute ceases to have any validity unless the repealing act contains some provisions preserving the validity of the bye-law notwithstanding the repeal. See the observations of Lord Reading, C.J. in *Watson* v. *Winch* (1916) 1 K.B. 688; *Surtees* v. *Wilson*, 9 B. & C. 750 (752) and the observations of Sankey, J. See also the difference of opinion on this matter between (the majority) Sir Patrick Spens, C.J., Varadachariar, J. and Zafrulla Khan, J. in *Umayal Achi* v. *Lakshmi Achi* (1945) F.L.J. 8 (F.C.) and the Interpretation Act 1889, S. 38.

(*b*) *Foreign Jurisdiction* (*S.* 294) : By S. 294 (1) areas like Quetta, Bangalore, Secunderabad, Mhow are excluded from federated states for the purpose of the exercise of the federal authority whether executive or legislative. His Majesty can make a declaration under the section only after giving notice to the Ruler of the State and if His Majesty with the Ruler's assent relinquishes his powers under the section the executive and legislative authority of the federation over the area revive. Sub-section (3) provides for the continuance in a state for a period of five years of any British Indian legislation in force in the state at the date of its accession by virtue of foreign jurisdiction even in respect of matters which become federal matters in the state on its accession. Sub-section (4) regularises the position of Political Officers under the Foreign Jurisdiction Act. Sub-section (5) prevents the trial by state Courts of British subjects for offences committed by them in the State. It is a right included in the concept of paramountcy. Under sub-section (6) from British Courts which are exercising foreign jurisdiction in federated states appeals lie to the Federal Court. S. 294 has been omitted by the India Provisional Constitution Order 1947.

(*c*) *Provisions as to Death Sentences* (*S.* 295) : Under the 1919 Act the Provincial and Central Governments had a concurrent power in regard to commuting suspending, remitting sentences etc. Such a thing is incompatible with provincial autonomy and hence the position is changed under the 1935 Act. By S. 295 save as

otherwise provided by that section no authority in India outside a province has any power to suspend, remit or commute the sentence of any person convicted in the province. In the case of a death sentence however the commutation etc., can still be done by the Governor-General acting in his discretion. The Criminal Procedure Code has been amended suitably by adding a new S. 402-A. The section does not affect sentences passed by Courts Martial or His Majesty's power to grant pardons reprieves etc. S. 295 (1) has been omitted by the India Provisional Constitution Order 1947.

(*d*) *Courts of Appeal in Revenue Matters* (S. 296): Members of the federal and provincial legislatures cannot by S. 296 be members of any tribunal in British India having jurisdiction to entertain appeals or revise decisions in revenue cases. The members of such tribunal are appointed by the Governor exercising individual judgment. The Governor also fixes their salary, allowance etc., exercising his individual judgment. The Governor exercises these powers until a provincial law makes other provision. The India Provisional Constitution Order 1947 has in sub-section (1) substituted ' a Governor's or Chief Commissioner's province ' for ' British India.' The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in sub-section (1) substituted the words ' dominion legislature ' for the words ' federal legislature.'

(*e*) *Freedom of Inter-provincial Trade* (S. 297): S. 297 prohibits a provincial legislature and a provincial Government from making any law or taking any executive action which prohibits or restricts the entry into or export from the province of goods of any class or description by virtue of entries 27 or 29 of list 2 of the 7th Schedule to the Act. By the same section no tax, cess, toll, or due can be imposed by any of the bodies above referred to which discriminates in favour of goods manufactured or produced in the province as against goods not so manufactured, or which discriminates between goods manufactured in one locality and similar goods manufactured in another locality, in the case of goods manufactured outside the province. A law made in contravention of the section shall be void to the extent of the contravention. The corresponding section in the Australian Constitution is S. 92 which provides that trade and commerce and intercourse among the states whether by means of internal carriage or ocean navigation shall be absolutely free. This section has occasioned more controversy and been the subject of more diversity of opinion than any other part of the constitution the industrial power included and is itself a striking testimony of the uncertainty which attaches to the use of popular phraseology in statutory enactments. Many conundrums have been propounded to the judges for solution based on the seemingly simple language of the section. One is whether a law during a war emergency expropriat-

ing the subject's property and vesting it in the Crown on its paying compensation to the owner is hit by S. 92. Isaacs, J. in *N.S. Wales* v. *Commonwealth* (1915) 20 C.L.R. 54 answered this question in the negative and held that deprivation of ownership did not prevent interstate trade. 'Trade and commerce consist in acts not things; true the things as well as human actors were indispensable but they did not form part of the trade and commerce itself and were not withdrawn from the state control in other relations merely because they happened to be engaged in the act of interstate trade.' 'Where the property is not expropriated but kept at the disposal of the Crown a more difficult question arises. In *Foggitt Jones* v. *New South Wales* (1916) 21 C.L.R. 357 such a procedure was held to be an infringement of S. 92 because the right of disposition remained in the owner and he was prevented from using it in interstate trade. In *McArthur* v. *Queensland* (1920) 28 C.L.R. 530 a Queensland Act which fixed the maximum price at which commodities (including commodities imported from other states) could be sold was held invalid. A law which prohibited freedom of contract with regard to the price of a given commodity was not a branch of the law of civil contract but a branch of the law of trade. It was not legislation with respect to contracts which was an item within the competence of the states. Then we come to the series of *Dried Fruits Cases* which have become famous. These arose out of a South Australian law setting up a Dried Fruits Board for the state. The object of the statute was to force the surplus dried fruit off the Australian market, firstly by fixing a limited amount for Australian consumption and secondly by preventing the sale of the balance of the output in Australia. S. 28 of the Act empowered the minister to acquire or purchase for the purposes of the Act any dried fruit grown and dried in South Australia. The majority of the Court in *James* v. *South Australia*, 40 C.L.R. held that S. 28 was valid but Isaacs, A.C.J. and Powers, J. dissented and held that S. 28 was also invalid because the object of the acquisition was plainly to withdraw the fruits from interstate trade as a perusal of the Act would show and this fact distinguished the acquisition in the present case from that in the *Wheat Case* (20 C.L.R. 54). The majority view was affirmed also in *James* v. *Crown* (1929) 43 C.L.R. 386 where Starke, J. found no difference in principle between an acquisition to maintain the Empire in times of war (as in the *Wheat Case*) or to feed the people of a state and an acquisition to maintain the industries of the state. The full court in (1930) 43 C.L.R. 386 upheld the view of Starke, J. The Privy Council on appeal (1932) A.C. 542 affirmed the view of Isaacs, J. and held S. 28 to be invalid in these words: 'If the real object of arming the minister with the power of acquisition is to enable him to place restrictions on interstate commerce as opposed to a real object of taking preventive measures against famine or disease and the like the legislation is as invalid as if the legislature

itself had imposed the commercial restrictions.' Professor Keith comments as follows on this judgment : ' The seriousness of the judgment is unquestionable for it is plain that the method of controlling the industry so as to secure a fair return to growers throughout the state in lieu of allowing unregulated profits is in the public interest.' In *Milk Board* v. *Metropolitan Cream Property Ltd.*, 13 A.L.J. 209 a law providing for the compulsory system of marketing of milk has been held to be quite valid. In the United States deleterious goods are held to be outside the commerce power and this view was taken in one Australian case *Ex parte Nelson* (1912) 16 C.L.R. 99 where the validity of a New South Wales Act which prohibited the importation of infected fodder into the state was upheld. But in *Tasmania* v. *Victoria*, 52 C.L.R. 157 a Victoria Act which prohibitied the importation of trees which were likely to introduce any disease was held to be invalid. A similar decision is that in *R.* v. *Smithers* (1912) 16 C.L.R. 99 relating to an Act which prohibited the entry of convicts into N.S. Wales. The validity of states Acts requiring the licensing of vehicles engaged in interstate trade have been upheld in a number of Australian decisions for example *Bessell* v. *Dayman* (1934-35) 52 C.L.R. 215. In *James* v. *Commonwealth* (1935) 52 C.L.R. 570 the Australian High Court held that S. 92 did not bind the Commonwealth. The question was left open in *James* v. *Cowan* (1932) A.C. 560 but in *James* v. *Commonwealth* (1936) A.C. 578 the Privy Council has overruled the view of the Australian High Court. S. 297 of the 1935 has not been interpreted much and perhaps its neat and legal phraseology has saved it from the fate of its counterpart under the Australian Constitution. S. 297 does not bind the federation and the federal legislature. S. 297 was considered by the Allahabad High Court in *Emperor* v. *Munna Lal*, A.I.R. (1942) All. 156. In that case the U.P. Sugar Factories Control Act 1 of 1938 provided that to each sugar factory should be reserved an area where sugarcane was grown and in which the cultivator must sell the sugarcane to the factory and the factory must purchase it at a price not below a minimum fixed by Government and the factory under the terms of its license must join a central organisation called a sugar syndicate in which sugar of members is pooled and is sold at a price reserved by the syndicate. It was contended that this Act prevented sugar-cane growers from exporting cane outside the province and hence the law should be declared invalid because it infringed S. 297. Dar, J. upheld the validity of the law on the ground that what S. 297 prohibited was a law restricting interprovincial trade passed by virtue of powers given by items 27 or 29 of the list 2. If the law was enacted by virtue of powers granted under other entries in list 2 it was valid. Here the law could be supported because it dealt with agriculture and development of industries which are items in list 2. The prohibition of the entry of diseased cattle, trees, plants, will not cause any trouble in India because

entry 14, list 2 validates laws imposing such a prohibition. The question whether an intention to discriminate and a capacity to discriminate are essential in order that S. 297 (1) may apply was left open by the Federal Court in *In re C.P. Petrol Tax Case*, A.I.R. (1939) F.C. 1 though Sulaiman, J. in that case thought that such intention was not essential; it was sufficient if the provision resulted in discrimination. Again does the word 'locality,' in the section include localities outside India? Sulaiman, J. thought it did, not.

(*f*) *Persons not to be subjected to Disability by reason of Race, Religion, etc.*, (*S.* 298) : Whereas many modern constitutions have a tendency to get choked under the heavy load they have to bear in the form of fundamental rights (See Appendix C. dealing with Fundamental Rights *post*) the 1935 Act has been relieved of such a burden. The Joint Parliamentary Committee thought it inadvisable to include a declaration of fundamental rights in the Constitution Act because either the declaration would be of so abstract a nature as to be of no legal effect or its legal effect would be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws might be declared invalid by the Court because they are inconsistent with one or other of the rights so declared. Again such a declaration might not apply to territories of Indian States. S. 298 was therefore the utmost limit to which the J.P.C. was prepared to go in the matter. The India Provisional Constitution Order 1947 has in sub-section (1) omitted 'British' and omitted sub-section (3). S. 298 lays down that no subject of His Majesty shall on grounds of religion, place of birth, descent, colour be ineligible for public offices or be prohibited on such grounds from acquiring, holding, or disposing of property or carrying on any occupation, trade, business or profession. The prohibition of the sale or mortgage of agricultural land to non-agriculturists on the ground of local custom is saved by sub-section (2) (*a*) while sub-s. (2) (*b*) saves the operation of laws which recognise the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.[62]

---

62. In *Megh Raj* v. *Alla Rakhia* (1947) F.L.J. 28 (P.C.) the impugned Act, the Punjab Restitution of Mortgaged Lands Act 4 of 1938 laid down a simpler procedure for redemption of mortgages with possession effected before 8-6-1901 by applying to the Collector for restitution of possession. It was argued that because most of the mortgagors were agriculturists and most of the mortgagees were non-agriculturists, this law offended S. 298 (1) which lays down that no person shall be prohibited from acquiring, holding, etc land on grounds only of descent etc. This contention was rejected by the Federal Court which held that the Act applied equally to agriculturist mortgagees and hence there was no prohibition on grounds of descent. The Privy Council held that "land" is not used in entry 21, list 2 with restricted reference to agricultural land but relates to land in general. The view that so important a subject as

(*g*) *Compulsory Acquisition of Land for Public Purposes* (*S.* 299): S. 299 lays down that no person shall be deprived of his property in British India save by authority of law. Neither a federal or provincial law can authorise the compulsory acquisition for public purposes of any land or any commercial or industrial undertaking or any interest in or in any company owning any commercial or industrial undertaking unless it provides for the payment of compensation and either fixes the compensation or specifies the principles on which it is to be determined. Bills transferring to public ownership any land require the previous sanction of the Governor-General or Governor in their discretion. Existing laws are saved by sub-section (3) while sub-section (4) defines 'land' as including immovable property of every kind and any right in or over such property and defines 'undertaking' as including a part of an undertaking. The India Provisional Constitution Order 1947 has in sub-section (1) omitted 'British India' and

---

mortgages was left out of the constitution to be dealt with by the Governor-General under S. 104 cannot be accepted.

The Punjab Land Alienation Act of 1900 prohibited permanent alienation of land without the sanction of the Deputy Commissioner except where the alienor was not a member of an agricultural tribe, or where both the alienor and the alienee were members of agricultural tribes. A person was a member of an agricultural tribe if he held land or ordinarily resided in a district and belonged to particular tribes. This Act led to abuses and gave rise to benami transactions where the beneficial interest belonged to a member of a non-agricultural tribe, even though the actual transfer was to a member of an agricultural tribe. The Punjab Alienation of Land (Second Amendment) Act 10 of 1938 rendered such transactions void. It was given retrospective operation. The majority of the Federal Court (Gwyer, C.J. and Varadachariar, J.) held that the Act operated as a prohibition on the ground of descent alone and because it contravened S. 298 (1) it was void. They also expressed the view that S. 298 (2) did not validate the Act because the benefit of the sub-section could only be claimed by future transactions and not past transactions which were sought to be invalidated. Beaumont, J. dissented in these words. " If the only basis of the Act is discrimination on one or more of the grounds specified in S. 298 (1), then the Act is bad ; but if the basis of the Act is something different the Act is not invalidated because one of its effects may be to invoke such discrimination. In my opinion, in the present case, the true object of the impugned Act is to avoid a method of evading the principal Act which itself is unobjectionable and although some of the rights avoided by the Act may be vested in persons whose only disqualification is lack of a particular descent, such lack of descent is not the only or even the primary ground on which the rights are avoided." The Privy Council took the view that it was not necessary to show that the prohibition was on grounds of descent only to render the Act invalid. It would be enough to show that such would be the result in some of the cases affected by the impugned Act. In so far as the retrospective provisions of the impugned Act were concerned they were invalid because they went far beyond S. 298 (2) which related only to future transactions. But the rest of the provisions of the Act were easily severable from the invalid provisions and the former was valid. *Punjab Province* v. *Daulat Singh* (1946) F.L.J. 41 (P.C.). The India and Burma (Temporary and Miscellaneous Provisions) Act 1942 substituted a new para for S. 298 (1) having the effect of validating Acts such as the impugned Act.

omitted sub-section (3). In *H. C. Gupta* v. *Mackeritch* (1945) F.L.J. 182 (H.C.) the question before the Calcutta High Court was whether Rule 75-A (1) of the Defence of India Rules which authorised the requisitioning of any movable or immovable property applied to the requisitioning of an undertaking. Derbyshire, C.J. and Gentle, J. answered the question in the affirmative and held that the word 'undertaking' is synonymous with the word 'business' and that the business of carrying on a hotel comes within the meaning of the word 'undertaking' in S. 299 of the 1935 Act and Rule 81 of the Defence of India Rules. The Lahore High Court in *Lahore Electric Supply Co., Ltd.* v. *Province of Punjab* (1943) 24 Lah. 617 has taken the opposite view. The provision in Rule 75-A (4) which says that the owner of the property shall be entitled to such compensation as Government may determine does not offend S. 299 (2). The India Provisional Constitution (Second Amendment) Order (Gazette of India Extraordinary 6-10-47) has substituted the words 'dominion legislature' for the words 'federal legislature' in the section. See also *Thakur Jagannath Baksh* v. *U. P.* (1946) F.L.J. 88 (P.C.) and *Hulas Narain* v. *Din Mohammed*, A.I.R. (1943) F.C. 9 in Chapter X *ante*.

(*h*) *Protection for certain Rights, Privileges and Pensions* (*S.* 300) : The order of the Governor-General or Governor as the case may be exercising individual judgment is required in order to derogate from any grant or confirmation of title of or to land or to any right or privilege in respect of land or land revenue being a grant made before 1-1-1870 or made after that date for services rendered. Pensions paid before 1-4-37 on political considerations or compassionate grounds shall not be discontinued or reduced save on an order of the Governor-General or Governor as the case may be exercising individual judgment. Such pensions are charged on federal or provincial revenues as the case may be. The section does not affect any remedy for a breach of any condition on which a grant is made. S. 300 has been omitted by the India Provisional Constitution Order 1947.

(7) High Commissioner for India (S. 302) : Under the 1919 Act the High Commissioner for India was appointed by the Crown and he acted as the Agent of the Central and Provincial Governments for entering into contracts etc., and looked after the welfare of Indian students who went to England for study. Under the 1935 Act S. 302 (1) the High Commissioner is appointed by the Governor-General exercising his individual judgment. The High Commissioner shall perform on behalf of the federation and on behalf of the reserved departments of the Governor-General such functions in connection with the business of the federation and in particular in relation to the making of contracts as the Governor-General may from time to time direct—S. 302 (2). The High Commissioner may with the approval of the

Governor-General and on such terms as may be agreed undertake to perform on behalf of a province or federated state or on behalf of Burma functions similar to those which he performs on behalf of India—S. 302 (3). The salary and conditions of service of the High Commissioner are prescribed by the Governor-General exercising his individual judgment—S. 302 (1). S. 302 has been omitted by the India Provisional Constitution Order 1947. See S. 15, Indian Independence Act 1947, Appendix A, p. 191 *post.*

(8) General Provisions (Ss. 303 to 310) : (*a*) *Sheriff of Calcutta* (*S.* 303): The Sheriff of Calcutta is appointed by the Governor of Bengal from a panel of three persons to be nominated by the High Court of Calcutta annually. In appointing, dismissing the Sheriff and in determining his remuneration the Governor shall exercise his individual judgment. The India Provisional Constitution Order 1947 has in sub-section (1) substituted ' West Bengal ' for ' Bengal ' and omitted sub-section (3) relating to the Governor exercising his individual judgment as regards the appointment etc. of the Sheriff. The Sheriff of Calcutta is responsible for executing writs of the High Court and for the service of process. He maintains his own staff and after charging service fees which are fixed by the High Court he retains any surplus left. The office is not honorary and honorific as in Madras and Bombay. Hence S. 303 provides that he shall be appointed by an authority which is not dependent entirely on political influence and possible intrigue. Previous to the 1935 Act the Sheriff of Calcutta was appointed by the Governor-General in Council under the Supreme Court Charter of March 1774.

(*b*) *Acting Governor-General, Governor etc.* (*Ss.* 304 *to* 306) : S. 304 lays down that an Acting Governor-General or Governor enjoys all the powers and immunities and is subject to all the duties of the Governor-General or Governor. If he holds any other office he shall not be entitled to the salary of that office while he is acting as Governor-General or Governor. The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 304 omitted the words " His Majesty ". By S. 305 the Governor-General and the Governor acting in their discretion appoint their secretarial staff and determine their salaries and the office accommodation and other facilities to be provided for them. The White Paper proposed that the salary and allowances of the Governor's secretarial staff should be fixed by order in council. This proposal was abandoned. At the head of this staff is a capable and experienced officer of high standing known by the designation of Secretary to the Governor with duties of a wider and more responsible character than those of the Governor's Private Secretary. S. 305-A newly added by the India and Burma Miscellaneous Amendments Act 1940 provided that where a civil servant was appointed by His Majesty or by the Governor-

General in his discretion to any office under the Crown in India the Secretary of State may direct that his service in that office shall qualify him for pension or gratuity as if it were service rendered in the office held by him as civil servant (as defined in the Superannuation Act 1887, S. 12). His pension was calculated in accordance with the Superannuation Acts 1834 to 1935 but on the basis of the salary of the office last held by him as civil servant. He could be given a pension even though he relinquished office before attaining sixty years. If without such direction the officer would become entitled to the grant of a pension the direction should not be given. The section also applied to appointments made before the passing of the Act and in the case of appointments made before 1-4-37 'Secretary of State in Council' was to be substituted for 'Secretary of State.' S. 305-A has been omitted by the India Provisional Constitution Order 1947. S. 306 exempts the Governor-General, Governor and the Secretary of State from all proceedings and processes of Courts in India whether in a personal capacity or otherwise and no proceedings can be taken against persons who have held the above offices for acts done by them during their term of office in performance or purported performance of the duties thereof except with the sanction of His Majesty in Council. A similar rule is applicable to the Crown Representative. Under S. 110 of the 1919 Act the Governor-General and the Governor were not subject to the original jurisdiction of the High Court, in respect of acts ordered or done in their public capacity. They were however subject to the High Court's original jurisdiction in respect of treason or felony. They were subject to the jurisdiction of the mofussil Courts. The 1935 Act gives them a larger protection. They cannot even be summoned as witnesses. Even acts done in a private capacity are protected. Compare *Hill* v. *Bigge* (1841) 3 Moo. P.C. 465. The liability of these persons to be proceeded against in English Courts is not affected. See Governors' Act 1699. Under the 1919 Act Ministers and Executive Councillors also enjoyed the exemption but the position is now changed. See *Venkataratnam* v. *Secretary of State for India*, 53 Mad. 979. The India Provisional Constitution Order 1947 has omitted references to the Secretary of State where those words first occur. Sanction has now to be given by the Governor-General instead of by His Majesty in Council. Proceedings can now be instituted against ex-Crown Representatives with the Governor-General's sanction. Sub-section (2) has been omitted. In *Musgrave* v. *Pulido* (1879) 5 App. Cas. 102 it was held that the Governor of a Colony cannot be regarded as a Viceroy. Nor can it be assumed that he possesses sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. For acts which are wholly beyond the authority confided to him he is liable. Such acts though the Governor may assume to do them as Governor cannot be

considered as done on behalf of the Crown nor to be in any proper sense Acts of State. In the dominions where executive authority is exercised by responsible ministers on principle the Governor-General ought not to be liable to be sued in Courts at least in respect of his official acts. He is in a different position from the Governor of a Crown Colony. See Prof. Kennedy in *Law Quarterly Review,* April 1932. There is however no authority on the point except *Sullivan* v. *Spencer* (1872) Ir. R. 6 C.L. 173 dealing with Lord Lieutenant of Ireland. See Keir and Lawson *Cases on Constitutional Law* (2nd Edn.) p. 423.

(*c*) *Removal of Certain Disqualifications* (*S.* 307) : For the purposes of the first elections to the federal and provincial legislature members of the Governor-General's Executive Council and of Governor's Executive Councils and persons holding offices which are not whole time offices remunerated either by salary or by fees shall not be disqualified. S. 307 has been omitted by the India Provisional Constitution Order 1947.

(*d*) *Procedure for amending Certain Portions of the Act etc.* (*S.* 308) : This section provides a plan whereby the federal and provincial legislatures are associated with the modification of the Act or Order in Council relating to the composition size and number of chambers of the federal and provincial legislatures and the qualifications of the electors. A very restricted constituent power is thus given. The only constituent powers conceded to the federal and provincial legislatures are (i) Power of provincial legislatures to modify S. 83 dealing with grants for Anglo-Indian and European education. (ii) When the federal legislature confers enlarged civil appellate jurisdiction on the Federal Court it can under S. 206 abolish direct appeals to the Privy Council and thus partially amend S. 110 (*b*). (iii) The powers conferred by S. 308. S. 308 is based on the 'Jayakar Scheme' which Mr. M. R. Jayakar (now the Rt. Hon. M. R. Jayakar) put forward during the Round Table Conferences. The extension of the franchise in the case of women comes into operation at once but in other cases the procedure does not come into operation for 10 years. The proposals relating to any of the matters referred to in S. 308 have to be passed by the federal and provincial legislatures in the form of a resolution on a motion proposed in each chamber by a minister on behalf of the council of ministers and presented to the Governor-General or Governor for submission to His Majesty. The Governor-General or Governor when forwarding the resolution shall also append his opinion as to the proposed amendment and as to its possible effect on any minority and as to whether a majority of the representatives of that minority in the legislature support the proposal. The Governor-General and Governor exercise the powers under the section in their discretion. Except resolutions providing that in the case of women literacy should be substituted for any higher educational standard which can be passed at once, other resolutions cannot be passed till the expira-

tion of ten years from the establishment of the federation, or 1-4-37 as the case may be. Even before the expiry of the said ten years His Majesty in Council may make amendments to the Act of such a nature as those referred to in S. 308 (2).

The views of the Governments and legislatures likely to be affected by the proposed amendment as well as the views of any minority likely to be affected shall be ascertained by the Secretary of State for India before laying the draft of any such order before Parliament unless the amendment is of a drafting or minor nature. Part II, 1st Schedule cannot be amended without the consent of the Ruler of any state likely to be affected by the amendment. S. 308 has been omitted by the India Provisional Constitution Order 1947.

See the Indian Franchise Act 1945 (9 & 10 Geo. VI, C. 2) which makes provision for the inclusion in electoral rolls in India of persons who have returned from war service and relaxes residence qualifications for those persons and extends certain Indian franchise qualifications which depend on service in His Majesty's forces or on the award of a pension.

(*e*) *Orders in Council* (*S.* 309) : S. 309 lays down the procedure for making orders in council under the Act. The draft of the order has to be laid before Parliament by the Secretary of State and both Houses have to present an address to His Majesty praying that the order may be made either without amendments or with such amendments as are agreed upon by both Houses. In cases of urgency the draft need not be laid before Parliament but it shall cease to have effect unless within 28 days of the reassembly of the Commons both Houses pass resolutions approving the making of the order. A subsequent order may revoke or vary a previous order. Orders in connection with appeals to the Privy Council and proceedings against ex-Governors-General, Governors, etc., do not come within the section. See the India and Burma (Emergency Provisions) Act 1940, under which during the war emergency the Governor-General can make orders in council under the section. The India Provisional Constitution Order 1947 has omitted S. 309.

(*f*) *Power to remove Difficulties* (*S.* 310) : S. 310 deals with the transition from the Government of India Act 1919 to the provisions of the 1935 Act and with the transition from Part XIII of the Act (which deals with the transition from the 1919 Act to the 1935 Act) to the provisions of Part II of the Act. For the purpose of facilitating such transition His Majesty may by Order in Council direct that the 1935 Act and any provisions of the 1919 Act still in force shall during such limited period as may be specified have effect subject to such adaptations and modifications as may be specified. No such order shall be made after the expiration of six months from the establishment of the federation

or after the expiration of six months from 1-4-37 as the case may be. S. 310 has been omitted by the India Provisional Constitution Order 1947.

(9) Interpretation (S. 311): This section defines 29 terms. The India and Burma Miscellaneous Amendments Act 1940 has added three new definitions : those relating to Indian State, Corporation Tax and Tax on Income. The first two have been already noticed in pp. 22 and 23 *ante*. The new definition of ' tax ' defines it as including a tax in the nature of excess profits tax. *Chimnadas Tekchand* v. *Emperor* (1944) F.L.J. holds that Kalat is an Indian State. The India Provisional Constitution (Second Amendment) Order 1947 (Gazette of India Extraordinary 6-10-47) has in S. 311 (2) (definition of " estate duty " added by the Indian Estate Duty Act 1945, 8 & 9 Geo. VI, C. 7) substituted the word ' dominion ' for the word ' federal '. The India Provisional Constitution Order 1947 has omitted sub-sections (1), (3), (4), and (5) of S. 311 and in sub-section (2) in the definition of ' corresponding province ', has substituted ' the Governor-General ' for ' His Majesty in Council '. In the definition of ' existing law ' for ' 1-4-37 ' ' establishment of the federation ' has been substituted and after ' territories ' ' which were ' has been inserted. In the definition of ' pension ' ' in India, Burma or Aden ' has been omitted and in the definition of 'Indian State Railway ' ' the federal railway authority ' has been omitted. In sub-section (6) for ' federal ' ' dominion ' has been substituted and ' or a Governor-General's Act ' and ' or a Governor's Act ' have been omitted.

(10) Transitional Provisions (Ss. 312 to 319) : These sections apply to the period from 1-4-37 up to the establishment of federation. During that time the executive authority of the federation will be exercised by the Governor-General in Council on behalf of His Majesty and it extends also to the raising on behalf of His Majesty in British India of naval, military, or air forces and the exercise of rights in and in relation to tribal areas by virtue of treaty grant usage sufferance or otherwise. References to the Governor-General and Federal Government in the Act shall be construed as references to the Governor-General in Council except in regard to discretionary matters of the Governor-General. References to the Federation shall be construed as references to British India, the Governor-General in Council, or the Governor-General as the context may require. The individual judgment functions of the Governor-General do not come into operation till the establishment of federation subject to exceptions such as requirement of prior sanction of Governor-General in regard to bills, broadcasting, directions to the Federal Railway Authority, recruitment to civil services by the Secretary of State for India. S. 314 places the Governor-General in Council and the Governor-General during the transitional period under the control of the

Secretary of State for India with respect to discretionary and other matters. Directions as to the appropriation of the revenues of the Governor-General in Council cannot be given by the Secretary of State for India except with the concurrence of his advisers. During the transitional period the number of advisers of the Secretary of State shall not be more than twelve nor less eight and on the establishment of federation such of the advisers as the Secretary of State may direct shall cease to hold office. See the India Miscellaneous Provisions Act 1944, Chapter XIV *ante*. By S. 315 during the transitional period if Parliament authorises him, the Secretary of State may contract sterling loans on behalf of the Governor-General in Council. See as to this Chapter XIV *ante*. The Secretary of State exercises the above power only with the approval of a majority of his advisers. No deduction shall be made in respect of any tax imposed by an Indian law from any payment of principal or interest in respect of such loan. Legal proceedings in respect of such loans may be brought in the United Kingdom against the Secretary of State without imposing any liability on the British Exchequer. S. 316 lays down that references to the federal legislature and federal laws shall be construed as references to the Indian legislature and the laws of the Indian Legislature during the transitional period. See the observations of Spens, C.J. and Varadachariar, J. on this section and on S. 321 in *Umayal Achi* v. *Lakshmi Achi* (1945) F.L.J. 8 (F.C.). S. 317 continues the provisions of the 1919 Act relating to the Central Legislature and the Governor-General's Executive Council with amendments consequential on the passing of the 1935 Act though the rest of the 1919 Act is repealed by the 10th Schedule. By S. 318 the Federal Court, the Federal Public Service Commission and the Federal Railway Authority can come into existence at once notwithstanding that the federation is not established. By S. 319 if legal proceedings are pending on the date of the establishment of the federation by or against the Governor-General etc., they can thereafter be continued by or against the federation. Ss. 312 to 319 have been omitted by the India Provisional Constitution Order 1947.

(11) Commencement, Repeals etc. (Ss. 320 & 321) : By S. 320, Part II of the Act has to be brought into force by His Majesty by issuing a Proclamation. The remainder of the Act shall come into force on such date as His Majesty may appoint. Particular provisions may be brought into force on one date and other provisions on later dates. By S. 321 the Government of India 1919 and the other Acts mentioned in the 10th Schedule are repealed to the extent mentioned in the third column thereof but this repeal does not affect any appointment made under any Act so repealed. But the preamble to the 1919 Act has been preserved. S. 320 has been omitted by the India Provisional Constitution Order 1947.

(12) Provisions with respect to Discrimination etc. (Ss. 111 to 121) : S. 111 exempts a British subject domiciled in the United Kingdom from the operation of so much of a federal or provincial law as imposes any restriction or the right of entry into British India or imposes by reference to place of birth, race, descent, language, religion etc., any disability, liability etc., in regard to travel, residence, acquisition etc., of property, the holding of public office, or the carrying on of any trade, profession etc. But this exemption is reciprocal and is conditional on British subjects domiciled in British India not being subjected to a similar disability, restriction etc., in the United Kingdom. The section does not invalidate quarantine regulations or the deportation of undesirable persons by any public authority. The Governor-General and Governor can by public notification suspend the operation of the section to prevent any grave menace to the peace or tranquillity of India or a province as the case may be. By S. 112 federal or provincial laws cannot in the matter of taxation discriminate against British subjects domiciled in the United Kingdom or Burma or against companies incorporated by the laws of those countries. By S. 113 companies incorporated in the United Kingdom, members of their governing bodies, and their shareholders shall be deemed to have complied with so much of a federal or provincial law which imposes conditions regarding the place of incorporation of the company, the currency in which its capital is expressed, or the place of birth, race, descent etc., of the governing body of the company or its shareholders. This is also subject to the condition that Indian companies are not discriminated against in the United Kingdom. Suppose a federal law provides that all companies engaged in the sugar industry shall get a rebate of 20 per cent on income tax if at least sixty per cent of their directors and shareholders are British Indian subjects. Such a benefit can be claimed even by a British company all of whose directors and shareholders are British subjects domiciled in the United Kingdom provided British legislation does not discriminate against Indian companies in the matter of granting rebate on income-tax. If a federal law lays down that the capital of a company carrying on business in India shall be expressed in rupees a British company carrying on business in India shall be deemed to have complied with that condition even though its capital is expressed in sterling. The section applies only to the currency and not to the amount of the share capital. Federal laws fixing a minimum share capital are quite valid and bind also British companies. By S. 114 British subjects domiciled in the United Kingdom shall be deemed to have complied with conditions as to place of birth, etc., imposed by federal or provincial laws in regard to companies incorporated in British India. This section is also subject to reciprocal treatment being accorded under the laws of the United Kingdom. While S. 113 deals with companies incorporated in the United Kingdom this section has reference

to companies formed by British subjects domiciled in the United Kingdom but incorporated and carrying on business in India. S. 115 prohibits the discriminatory treatment by federal and provincial laws directed against ships registered in the United Kingdom, their master, crew, passengers, provided ships registered in British India are not discriminated against in the United Kingdom. By S. 116 companies incorporated in the United Kingdom shall be eligible for grants, bounties, subsidies to the same extent as companies incorporated in British India notwithstanding any federal or provincial law. A distinction is made by the section between companies engaged in the trade or industry at the date of the passing of the federal or provincial Act and those which engage in such trade subsequently. In the case of the latter the section lays down that it may be a condition of eligibility for the grant that the company should be incorporated by or under Indian law, that such proportion not exceeding one-half of its directors are British subjects domiciled in British India or subjects of a federated state and that the company give reasonable facilities for training British subjects domiciled in India etc. This section gives effect to the Joint Parliamentary Committee Report paragraph 356. S. 117 applies the provisions of the chapter to ordinances, orders, bye-laws, rules, regulations etc., having by virtue of any federal or provincial law the force of law. When reciprocal treatment is secured to British subjects domiciled in India and to companies incorporated in British India by a convention made between the Indian and British Governments, and necessary legislation is passed by both countries to give effect to the convention. His Majesty may by order in council declare that while such order is in force the operation of the above sections shall be suspended. By S. 119 bills which prescribe professional or technical qualifications or which impose by reference to such qualifications any disability restriction etc., in regard to the practising of any profession or the carrying on of any trade etc., require the previous sanction of the Governor-General or the Governor in his discretion as the case may be prior to their introduction in the federal or provincial legislature as the case may be. Such sanction shall not be given unless existing members lawfully practising the profession are allowed to continue to do so unless public interests require that they should be debarred from doing so. Regulations made under federal and provincial laws referred to above shall be published at least four months before they come into operation and if within two months after their publication complaints are received against them the Governor-General or Governor can disallow them if he thinks the complaint is well founded. The Joint Parliamentary Committee turned down a suggestion that persons with United Kingdom qualifications should be secured a statutory right to practise in India by virtue of those qualifications. The provisions of this sub-section can also be

applied by notification by the Governor-General to existing Indian laws. S. 120 deals with medical qualifications. Under the British Medical Council Act 1886 the Privy Council can compel the British General Medical Council to recognise a medical diploma which it has refused to recognise for the purpose of registration and practising the profession in the United Kingdom. In 1930 the General Medical Council refused to recognise Indian Medical degrees because the Indian Legislature refused to provide money for a system of inspection and because there was no central authority in India to maintain uniform standards in the matter of medical qualifications. In 1933 the Indian legislature passed the Indian Medical Council Act 1933 under which foreign medical diplomas would be continued to be recognised for four years. In that period the Indian Medical Council would negotiate with foreign bodies for the reciprocal treatment of Indian Medical diplomas. If the negotiations should prove unsuccessful the Governor-General could at the end of the four years withdraw recognition to those foreign diplomas. Any withdrawal of recognition from a foreign diploma can be done now only after giving one year's notice to the Governor-General and the University which has conferred the diploma and there is also a right given to the person or University aggrieved to appeal to the Privy Council which after hearing evidence shall determine whether the holder of the diploma by virtue of the diploma possesses a requisite knowledge and skill for the practice of medicine, surgery, and midwifery and shall notify their determination to the Governor-General who shall communicate it to such authorities as he thinks fit. Persons who hold a commission from His Majesty and who are officers in the Indian Medical Service on the active list shall be deemed to be qualified to practise medicine, surgery, midwifery etc., in British India by S. 121 and can by virtue of such a commission be entitled to be registered in British India. Members of the Royal Army Medical Corps and the Air Force Medical Corps would also according to the Joint Parliamentary Committee be entitled to claim the benefit of S. 121. Ss. 111 to 121 have been omitted by the India Provisional Constitution Order 1947.

(13) Schedules to the 1935 Act : The second and third schedules have been dealt with in Chapter XIV topic (1) (*c*) and (*d*) respectively. The 7th schedule has been noticed in Chapter X. The 8th schedule has been considered in Chapter V. The 9th schedule is referred to in Chapter I, p. 29 *ante*. The 10th schedule is noticed in Chapter XV topic (1). The 1st schedule deals with the composition of the federal legislature and the 4th schedule with forms of oath or affirmation, the 5th schedule with the composition of the provincial legislatures the 6th schedule with provisions as to franchise, and the 10th schedule with repeals. The first, second, eighth and ninth schedules have been omitted by the India Provisional Constitution Order 1947. The amendments made by the India Provisional Constitution Order, 1947 to

the 3rd schedule have been already noticed in Chapter XV topic (1). The India Provisional Constitution and Provincial Legislatures Amendment Order 1947 (Gazette of India Extraordinary 7-9-47) has made a number of amendments to the 5th schedule and to the India Provincial Legislatures Order 1947 the object of which is to preserve the seats of certain members of the Bengal legislature who are to be deemed to have been elected by the appropriate West Bengal constituencies and to continue pending election petitions with respect to elections to the West Bengal and East Punjab legislatures. If a member of a provincial legislature is chosen to a legislature in Pakistan at the end of one month from 15-8-47 his seat in the provincial legislature becomes vacant. The India Provisional Constitution Order 1947 has made the following amendments to the 7th Schedule: List 1 : For entry 1 a new entry has been substituted ; in entry 2 the words ' not being cantonment areas of Indian state troops' have been omitted. In entry 39 for extending the jurisdiction of the police force of one province to an area in another province the consent of the Government of that province is necessary. In list 2, entries 23 and 29 and in list 3, entry 34 for ' federal ' ' dominion ' has been substituted.

Appendix A

THE INDIA OFFICE

The Secretary of State for India in Council as a statutory corporation which alone can be plaintiff or defendant in any litigation instituted by or against any Government authority has disappeared after the Act of 1935 because it is manifestly incompatible alike with provincial self government and with a responsible federal government. The Joint Parliamentary Committee Report said in paragraph 385 : ' But in our opinion it is still desirable that the Secretary of State should have a small body of advisers to whom he may turn for advice on financial and service matters and on matters which concern the political department.' Formerly the Secretary of State for India in Council had power to dispose of real or personal estate vested in the Crown raise money on mortgage make and vary contracts and raise loans in the United Kingdom for the purpose of the Government of India. The Secretary of State's power to dispose of real and personal property vested in the Crown is now under the 1935 Act limited by S. 172 (2) and has to be exercised with the consent of the Governor-General. See also S. 172 (4) which gives power to the Secretary of State to dispose of articles in buildings vested in His Majesty for the purposes of His Majesty's Government in the United Kingdom without the concurrence of the Governor-General. The Secretary of State's power to raise loans is under the 1935 Act confined to contracting sterling loans. See S. 315. S. 278 (1) lays down that there shall be a body of persons not less than three nor more than six appointed by the Secretary of State whose duty it shall be to advise him on any matter on which he may desire their advice. Sub-section (2) provides that one-half at least of such advisers should have held office for at least ten years under the Crown in India and must not have last ceased to perform in India official duties under the Crown more than two years before the date of their appointment as advisers. Sub-section (3) limits the tenure of office of advisers to five years and makes them ineligible for reappointment. An adviser may resign his appointment or he may be removed by order of the Secretary of State if he is satisfied that by reason of infirmity of mind or body he has become unfit to hold the office. Sub-section (4) disqualifies advisers from sitting or voting in either House of Parliament. The advisers are by sub-section (5) paid a salary of £ 1,350 a year with an additional subsistence allowance of £ 600 a year to such of them as are domiciled in India. The plan under the 1919 Act was that the expenses of the India Office were paid out of the Indian revenues but the Treasury made a contribution in the form of a grant-in-aid (£ 110,000 a year) from British revenues. Under the 1935 Act the Treasury will provide for the India Office the Government of India making a contribution in respect of agency functions performed by the India Office for the Government of India. This gives effect to the recommendations of the Joint Parliamentary Committee Report (paragraph 389). 'As soon as we have as advisers to the Secretary of State members of one or the other House of Parliament those members might go to one or the other House and make speeches or give votes contrary to the policy of the Secretary of State. That from the constitutional point of view would be an intolerable position.' Hence the prohibition enacted by S. 278 (4). S. 278 (6) provides that it shall be in the discretion of the Secretary of State whether or not he consults his advisers except as otherwise expressly provided by the 1935 Act and whether he consults them individually or collectively and whether he accepts their advice or not. S. 278 (7) lays down that the Secretary of State shall be deemed to have obtained the concurrence of his advisers if he has obtained their opinion by circulation of papers according to the present practice. Formerly under the 1919 Act the list of matters in regard to which the Secretary of State for India had to obtain the concurrence of members of his

Council was a formidable one and included (i) Appropriation of the revenues of India (ii) Sale of real or personal estate (iii) Making of contracts (iv) Passing of orders affecting the salary of members of the Governor-General's Executive Council (v) Making rules prescribing the conditions of service of members of the All-India Services etc. Now the Secretary of State under the 1935 Act is obliged to obtain the concurrence of his advisers only in regard to service matters (S. 261) and in regard to contracting sterling loans S. 315 (2) during the transitional period, giving directions to the Governor-General with respect to the appropriation of the revenues of the Governor-General in Council—S. 314 (2). By the India (Miscellaneous Provisions) Act 1944 (7 & 8 Geo. VI, C. 38) in S. 314 (3) of the 1935 Act (which provides that while part XIII of the Act is in operation the advisers of the Secretary of State shall be not more than twelve nor less than eight in number) for the word 'eight' the word 'five' was substituted by S. 3 of that Act.

By S. 279 existing accounts of the Secretary of State for India in Council with the Bank of England shall as from 1-4-37 be transferred to the credit of the Secretary of State. By S. 280 the expenses of the India Office are paid out of the British revenues but the Federation makes a contribution towards that part of it which is attributable to the performance of agency functions by the India Office on behalf of the Federation. S. 281 transfers the existing personnel of the Secretary of State for India in Council to the department of the Secretary of State for India. The Superannuation Acts 1834 to 1935 apply to such persons with such modifications as His Majesty may by Order in Council direct. It shall be lawful for the Treasury to commute for a capital sum so much of any superannuation compensation or retiring allowance as is payable out of moneys provided by Parliament to persons so transferred notwithstanding anything in the Pensions Commutation Acts 1877 to 1882. S. 282 lays down that so much of any such compensation retiring allowances etc., which is attributable to service before the date of such transfer to the department of the Secretary of State shall be paid out of the revenues of the Federation. The liability for pensions etc., in respect of the service of such persons before 1-4-37 shall be a liability of the Federation and shall be charged upon the revenues of the federation. S. 284 is intended to ensure that the subscribers to the funds mentioned therein who were paid by the Secretary of State for India in Council the sums to which they were entitled out of the revenues of India are now paid those sums out of the revenues of the Federation and these sums are by the section charged on those revenues. The section refers to three funds which have long since been closed to fresh entrants. The Regular Widows' Fund established in 1820 was subscribed by the superior or officer class who served the East India Company. The Elder Widows' Fund also established in the same year was subscribed by members of the extra department (overseer of labour in the warehouse of the East India Company) and by extra clerks, attendants, messengers and other subordinates. The India Office Provident Fund established in 1877 was intended to provide pensions to the widows of members of the permanent staff of the Secretary of State who were not subscribers to either of the above two funds. The sums involved out of the payment of these pensions are not over £1,000 a year. S. 284-A was newly introduced by the India and Burma (Miscellaneous Amendments) Act 1940, S. 2 and is as follows :–

'(1) Any appointments which the Secretary of State in Council has purported to make to his permanent establishment before the commencement of Part III of this Act and any increase which he has purported to make in the salaries of persons on that establishment shall for all purposes be deemed to have been validly made notwithstanding that the making thereof was not sanctioned by an order of His Majesty in Council as provided by S. 17 of the Government of India Act. (2) Any appointments which the auditor of the accounts of the Secretary of State in Council has purported to make to his staff before the commencement of the said Part III shall be deemed

to have been validly made notwithstanding that the making thereof was not authorised by such a warrant of His Majesty as is mentioned in S. 27 of the Government of India Act and all salaries paid to any person on the auditor's staff shall be deemed to have been duly paid notwithstanding that they were not so authorised.'

Amendments : Ss. 278 to 284-A have been omitted by the India Provisional Constitution Order 1947. S. 10 of the Indian Independence Act 1947 (10 and 11 Geo. VI, C. 30) lays down that the provisions of the 1935 Act relating to appointments to the civil services of and civil posts under the Crown in India by the Secretary of State and the provisions of that Act relating to reservation of posts shall not continue in force. Persons who having been appointed by the Secretary of State or the Secretary of State in Council to a civil service of the Crown in India or who having been Federal Court or High Court judges continue to serve in either of the two new Dominions of India and Pakistan shall be entitled to receive the same conditions of service as respects remuneration leave and pension and the same rights as respects disciplinary matters etc., as those persons were entitled to immediately before 15th August 1947. S. 14 authorises the Secretary of State or such other minister as may be designated by order in Council to continue functions as to the making of payments and other similar functions which the Secretary of State was performing before 15-8-47, on behalf of the governments constituted under the 1935 Act. These functions include the management of government debt and the payment of the same. The prohibition imposed by S. 315 of the 1935 Act on the Governor-General in Council as respects the contracting of sterling loans is not to be applicable to the Governments of India and Pakistan. As from 15-8-47 there shall be no advisers of the Secretary of State as required by S. 278 of the 1935 Act. The auditor of Indian Home Accounts is authorised to continue to exercise his functions as respects the accounts of the Secretary of State or other minister as is mentioned above. By S. 15 any provision of any enactment which but for the passing of this Act would authorise legal proceedings to be taken in India or elsewhere by or against the Secretary of State in respect of any right or liability of India or any part of India shall cease to have effect on 15-8-47 and any such legal proceedings pending on that date shall abate on the said day so far as the Secretary of State is concerned. Such legal proceedings shall instead be brought (*a*) in the case of proceedings in the United Kingdom by or against the High Commissioner (*b*) in the case of other proceedings by or against such person as may be designated by order of the Governor-General or otherwise by the law of the new dominions concerned and proceedings against the Secretary of State which are pending immediately before 15-8-47 shall be continued against the persons mentioned above. The right conferred by this section to bring or continue proceedings may be withdrawn by a law of the legislature of either of the new dominions so far as that dominion is concerned even as respects pending proceedings. ' High Commissioner ' means in the section the person who is performing functions similar to those performed by the High Commissioner referred to in S. 302 of the 1935 Act and legal proceedings which are the subject of appeal to His Majesty in Council immediately before 15-8-47 shall be treated for the purposes of the section as legal proceedings pending in the United Kingdom.

Appendix B

THE INDIAN STATES

(1) The States before 15-8-47.—Before the Independence Act 1947 the Indian States were occupying a very peculiar position in Indian polity which was inadequately expressed by the term ' Paramountcy ': Many learned writers like Sirdar Panikkar, Lee-Warner, Tupper, Sen and others have explained this peculair political concept in their books which are all now of merely historical and academic interest consequent on the claim made by the States of the attainment of full sovereignty on the liquidation of the British power in India. But nevertheless since in politics as in other spheres the past to some extent invariably explains the present and influences the future, the first named cannot be completely ignored and hence a history of paramountcy from the earliest times up to 15-8-47 is given in a footnote * for

---

Historical Note

*The term 'state' was a very elastic term and the Simon Commission and the Butler Committee applied it to 562 units while the Joint Parliamentary Committee referred to 600 units as states. The populous state of Hyderabad with an area of 82,313 square miles is referred to as a state in the same breath alongside a petty principality covering a few acres and this anomaly has contributed not a little towards the political ills of India during recent times. The following list of states comprising one square mile of territory each, will give us some idea of the complications of the problem of Indian States: Bhalgam Baldoi, Bhalusna, Chandli, Chitravav (Devani), Dhola (Devani), Gadhula, Jalia Manaji, Jumkha, Katodia (Vachuani), Khijadia (Dosaji), Khijadia (Nayani), Mehmadara, Moka Paginu Muwada, Nalia, Noghanvadar, Pah, Rampura, Ranipura, Rohisala, Samadhiala, (Choka Thana), Samadhiala, Sibdi Vadar, Sisang, Songadh (Vachhani), Toda (Vachhani) Vadal (Bhandaria), Varnol Nani. Paramountcy as it was known before 1947 was entirely a creature of political accident rather than a result of premeditated design and Wellesley would have turned in his grave when he heard the interpretations put upon this doctrine by his successors of more recent times. The idea took birth in the ringfence policy adopted at first by the East India Company. This meant that the Company instead of defending their own frontier undertook to defend the frontier of their immediate neighbour at his expense. Next came the system of subsidiary alliances initiated by the Marquis of Wellesley under which the Company undertook to protect the Ruler from external aggression and internal rebellion on condition he paid for the same and also undertook not to have any relations with any other Power without consulting the British. The idea was to place the ruler in such a degree of dependence as to prevent him from taking any measures hazardous to the security of the Empire. Even then the internal sovereignty of the rulers was not questioned. Even when the Raja of Coorg in the time of Lord William Bentinck put the agent of a friendly Power in prison, Britain intervened on the basis of international law and not on the basis of paramountcy. The Governor-Generalship of Lord Dalhousie saw a more aggressive policy towards the States and some of them were annexed when the rulers died without heirs. It was only during the time of Lord Mayo that we find the earliest trace of British interference in the internal affairs of states. Lord Mayo warned the Rulers that if they did not treat their subjects properly the British would intervene. The right to approve of the appointment of Dewan and to carry on the administration during the ruler's minority was also claimed. The trial of the Gaekwar of Baroda during the regime of Lord Northbrook in 1874 for the alleged poisoning of the Resident and the Mysore Rendition Treaty of 1881 made further inroads on State sovereignty

the sake of elucidation and information. A brilliant and succinct analysis of " paramountcy " is provided by the *White Paper on Indian States* of July 1948 (pp. 6 and 7) which is worth quoting : ' The paramountcy of the British Crown was not co-extensive with the rights of the Crown flowing from the treaties. It was based on treaties, engagements and sanads as supplemented by usage and sufferance and by decisions of the Government of India and the Secretary of State embodied in political practice. The rights that the paramount power claimed in exercise of the functions of the Crown in relation to the States covered matters both external and internal. For external purposes State territory and State subjects were in the same position as British territory and British subjects. The States had no international life and in consequence of the loss by them of their power of negotiation and legation the paramount power had the exclusive authority of making peace or war or negotiating or communicating with foreign states..... The right of intervention in the internal affairs could be exercised for the benefit of the ruler of the state, of India as a whole, or for giving effect to international commitments. The authority of the paramount power could thus be interposed *inter alia* for the prevention of dismemberment of a state, the suppression of rebellion against the lawful sovereign, the prevention of gross misrule, the economic growth of the whole of India, checking inhuman practices or offences against natural

---

and firmly established paramountcy as a potent political concept. Mysore was administered by British officers for 50 years and when the State was handed back to the Ruler stringent conditions were imposed such as the surrender of offenders found there who had escaped from British India, employment of foreigners in the State service only subject to the approval of the Government of India, etc. The Mysore case was a peculiar case because it was conquered by the British and the Ruler was placed on the *gadi* as the nominee of the British. Equating paramountcy as applicable to Mysore with paramountcy as applied to Gwalior or Indore which were never under foreign subjection at any time during their long history, was the error which set in motion a chain of mischievous consequences the task of undoing which is taxing all the ingenuity and trying all the patience of those in charge of the destinies of India at present. Once the principle of internal intervention was recognised it gathered momentum with the passing of the years very easily. In the *Manipur case* of 1890 the Maharaja refused to expel the Commander-in-Chief who had raised a rebellion in the State and was therefore deposed by the paramount power. In the *Indore case* the Maharaja was suspected of having instigated a murder committed in Bombay and was asked to give up all his powers pending investigation by a judicial commission. The ruler protested and chose to abdicate. In the *Udaipur case* the Crown thought that the methods of administration pursued by the ruler were very antiquated and so his powers were curtailed. In his letter to the Nizam of 1926 Lord Reading the Viceroy of India put the official and authoritative gloss on paramountcy in the following historic words. ' Paramountcy is not entirely based on treaties but exists independently of them. It is the right and privilege of the paramount power to settle the disputes between the states or between the Crown and any state and if any court of arbitration is appointed this is merely for the purpose of giving independent advice to the Government of India with whom the ultimate decision rests.' Mr. M. Ruthnaswamy has also felicitously characterised paramountcy as the ' political idea forged by the British in the factory of experience.' Hall and Westlake deny the claim of the States to international existence while Phillimore and Lee Warner support that claim. In the view of the latter much violence must be done to treaties, legal decisions and long established usage if the States are to be denied their sovereignty. As regards jurisdiction states fell into four classes before 1947 : (i) Those which enjoyed full jurisdiction like the Rajputana States. (ii) In states of the second type like the Kathiawar states they could not try foreigners for offences committed within such states. (iii) In the case of states of the third type like Panna, death sentence passed by the state

law or public morality. The paramount power was responsible for the defence of both British India and the Indian states and exercised full control over all matters connected with defence such as the establishment of cantonments, the regulation of the strength of armed forces of the state etc..... Lastly the paramount power claimed the following important rights derived from the Royal Prerogative. These included the exclusive right to settle precedence and to grant honours, to regulate ceremonies, to recognise all successions and to settle disputes as to succession, to impose or remit *nazarana* or succession duties, to take charge of the states of minors and to provide for their education and to impose the duty of loyalty to the Crown.' The position of the Indian States under the scheme of the 1935 Act has been sufficiently dealt with in Chapter XIV topic 1. The cardinal principle underlying the 1935 scheme so far as the States problem is concerned can be summed up thus : paramountcy to be retained intact and to be supplemented by a voluntary association of the States with Britsh India for purposes of mutual co-operation and advantage. Under his Scheme of 1942 Sir Stafford Cripps saw no fundamental impossibility in the suggestion of a separate Union for Indian States as opposed to a separate Union of British Indian Provinces. The Cabinet Mission Plan of 16th May 1946 unequivocally laid down that the rights surrendered by the States to the paramount power would return to the States. The void caused by the lapse of paramountcy was suggested to be filled either by the states entering into a federal relationship with the successor Government or Governments in British India, or by entering into particular political arrangements with it or them. The Indian Independence Act 1947, S. 7 (1) (*b*), lays down that on 15-8-47 all treaties and agreements in force between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance, or otherwise lapse, provided that agreements relating to customs, transit, and communications, posts and telegraphs, or other like matters, shall continue to be given effect to as nearly as may be until denounced by the ruler of the Indian State or by the Dominion or Province or until superseded by subsequent agreements.

The question has been raised whether the creation of the two new dominions of India and Pakistan in 1947 has affected the international integrity of India to such an extent as to prevent an automatic transference of treaty rights to it from the previously existing paramount power.

---

courts required the confirmation of the Crown Representative. (iv) In the case of states belonging to the last class like the Bihar and Orissa states they could not try foreigners and they could not also try serious offences like murder or robbery. In *Yusufuddin* v. *Queen-Empress*, 24 I.A. 137 a subject of the Nizam was arrested on the Nizam's railway for an offence committed in British India under the warrant of a British Indian magistrate. The Nizam had by a treaty ceded jurisdiction along the railway line running through his state. It was held that the arrest was invalid because the jurisdiction related only to offences committed on the railway line or connected with the railway administration. In Chamba, Nabha, Jind, Patiala and Gwalior, there were separate postal systems which worked in co-operation with the Indian system. In Charkhari, Orchha, Shahpur, Junagadh, Kishengarh, Udaipur, Jaipur, Cochin, Travancore and Hyderabad there were separate postal systems which did not work in co-operation with the British Indian postal system. 27 states enjoyed free service stamps and in Bhawalpur, Banganapalli, Bhopal, Mysore, Pudukottai and Rewa official correspondence within the state was carried free by the Indian post offices. Only 20 states possessed the right of minting coins, including Udaipur and Jaipur. In Travancore there was a paper rupee though it was not coined. The Nizam possesses the right of issuing paper currency.

The view is prevalent that what has happened in the case of India is secession of a small part of it and not disruption and therefore India's treaty rights are unaffected by the process and it can exercise paramountcy functions over the States as the successor to the British Government. See (1947) F.L.J. 121. See as to the topic of Indian States generally the following articles : (1946) F.L.J. 65: (1946) F.L.J. 1. The Ministry of States was created on 5th July 1947 and on 25th July 1947 a special meeting of the Princes was held to consider the question of the accession of the States and the formula regarding the Standstill Agreements. The Instruments of Accession executed by the Rulers provided for the accession of States to the Dominion of India on three subjects, namely, defence, external affairs, and communications, their content being as defined in list 1 of the 7th schedule to the 1935 Act. Standstill Agreements the acceptance of which was made by the Government of India conditional on the accession by the States concerned were also entered into between the Dominion Government and the acceding state. The Standstill Agreement of 29th November 1947 made between the Nizam of Hyderabad and the Dominion of India provides for the continuance of all agreements and administrative arrangements as to matters of common concern including external affairs, defence, and communications which were existing between the Crown and the Nizam immediately before 15-8-47 until new agreements in this behalf are made. See *White Paper on Hyderabad* p.43. After the problem of accession of States came the problem of democratising them and integrating them into units of reasonable size. The fitting of the States into the constitutional structure of India has been accomplished by the three means of (*a*) Merger of States in the adjacent provinces; (*b*) Consolidation of States into centrally administered areas ; (*c*) Integration of States to create new viable units.

(2) **Merger into adjoining province.**—25 of the Orissa and Chattisgarh States merged with Orissa and the Central Provinces on 1-1-48. The Government of the two states of Seraikela and Kharsawan was handed over to the Government of Bihar on 18-5-48. All Deccan States with the exception of Kolhapur have been, by an agreement of 19-2-48, administratively integrated with Bombay Province. The rulers of the jurisdictional Gujerat States, by an agreement dated 19th March 1948, decided upon merger with Bombay province. Loharu, Dujana, and Pataudi by agreements of 17-2-48, 3-3-48, and 18-3-48 respectively merged with East Punjab, and Banganapalli and Pudukottai in Madras merged with Madras Province by agreements dated 18-2-48 and 29-2-48 respectively.

(3) **Consolidation of States into Centrally administered Areas.**—The East Punjab Hill States have been constituted into a centrally administered unit to be known as Himachalapradesh with effect from 15-4-48. Bilaspur is to be administered as a separate unit because of the contemplated location of the Bakhra Dam project in that state. Kutch has also merged in the Dominion and its administration has been transferred to the dominion from 1-6-48 and it will be administered under a Chief Commissioner.

(4) **Integration of States to create new viable Units.**—Examples of this are the United State of Kathiawar (Saurashtra), United State of Matsya, Vindhya Pradesh, Rajasthan, Gwalior, Indore and Malwa (Madhyabharat) and Patiala and East Punjab States Union.

(*a*) *Saurashtra.* This comprises 13 salute states including Nawanagar, Bhavnagar, Porbander, Morvi, Gondal, Palitana, Limbdi, etc., and 17 non-salute states including Kotda Sangani, Lakhtar and others. There is a council of rulers of the covenanting states. There is also a presidium consisting of five such rulers. The rulers of Nawanagar and Bhavnagar are permanent members of the presidium, one member is elected from among themselves by the rulers of covenanting non-salute states, and the others shall be elected from among themselves by the members of the council of rulers other than Nawanagar and Bhavnagar. The council of rulers shall elect one member

of the presidium to be the president and another to be the Vice-president and the president shall be the Rajapramukh. The rulers of Nawanagar and Bhavnagar have been on 17-1-48 elected President and Vice-president respectively of the presidium. The term of office of members of the presidium and the President is five years. The Rajapramukh is entitled to the same salaries, allowances and other amenities as the Governor of Bombay. A Kathiawar Constituent Assembly to be formed soon shall frame a constitution for the state within the framework of the covenant and the constitution of India and providing for a government responsible to the legislature. The interim ministry is chosen by the Rajapramukh on the advice of the members of the electoral college of Kathiawar formed for electing representatives to the Constituent Assembly of India excluding members from the states of Kutch, Idar, and Radhanpur. The ruler of each state is entitled to the enjoyment of his private property and he should furnish an inventory of the same to the Rajapramukh. The succession to the *gadi* and the personal rights, privileges, dignities of the rulers are guaranteed and the ruler of each state is entitled to receive annually an amount in respect of his privy purse. Nawanagar and Bhavnagar head the list with 10 lakhs a year, and Jafrabad is lowest in the list with 16,000 a year. The new state came into being on 15-2-48 and comprises 217 states and 449 estates.

(*b*) *Matsya*.—This consists of the States of Alwar, Bharatpur, Dholpur, and Karauli. These rulers signed the covenant on 28-2-48. Their privy purse amounts have not been fixed.

(*c*) *Vindhyapradesh*.—This comprises 35 Bundelkhand and Bagelkhand states like Charkahari, Rewa, Orchha, Panna and others. This state constitutes a narrow corridor between the Central Provinces and the United Provinces and is rich in mineral resources and forest wealth but constitutes one of the most undeveloped regions in Central India. The Kathiawar model has been varied in some respects to meet the special requirements of this region and certain concessions above been made to ensure for the Rewa state and its ruler a place commensurate with Rewa's importance. In the council of rulers while all the other members will have one vote each, the ruler of Rewa will have 15 votes for the purpose of election of the president and vice-president. If three-fourths of the representatives of Rewa in the Constituent Assembly vote for opting out of the Union, Rewa will go out of the picture. Rewa heads the privy purse list with 10 lakhs a year and Banka Pahari and Bijna come at the tail end with 3,000 a year. It was inaugurated on 4-4-48.

(*d*) *Rajasthan*.—This comprises the nine states of Basnwara, Bundi, Dungarpur, Jhalawar, Kishengarh, Kotah, Partabgarh, Shahpura, and Tonk. It was inaugurated on 25-3-48. Udaipur joined later and has been given special privileges. The Maharana of Udaipur will be Rajapramukh during his lifetime and will receive a privy purse of 10 lakhs a year. He will be given an allowance of 5 lakhs a year for holding the office of Rajapramukh. The Maharao of Kotah will be the senior Uparajapramukh. 5 lakhs per annum will be paid to the Udaipur ruler for charitable and religious purposes. This Union was inaugurated on 18-4-48.

(*e*) *Gwalior, Indore and Malwa* (*Madhyabharat*).—This comprises 21 states in Central India and was inaugurated on 28-5-48. The ruler of Gwalior will be the Rajapramukh and the Indore ruler will be the Uparajaparamukh during their lifetimes. The privy purse of the Gwalior and Indore rulers has been fixed at 25 and 15 lakhs respectively for the lifetime of the present rulers. For states with more than 50 per cent *Bhil* population (Bhils are extremely backward tribes) the law-making power is vested with the Rajapramukh. Such states are treated as "excluded areas". The rulers of Gwalior and Indore can exercise their present powers of suspension, remission, commutation etc., of death sentences in respect of sentences for offences committed within their territories.

(*f*) *Patiala and East Punjab Union.*—This comprises the six salute states of Patiala, Kapurthala, Jind, Nabha, Faridkot, Malerkotla, and the two non-salute states of Nalagarh and Kalsia and the covenant was signed on 5-5-48. The rulers of Patiala and Kapurthala are the Rajapramukh and Uparajapramukh respectively during their lifetime. The rulers will have, for the purpose of election of the Rajapramukh, such number of votes as is equal to the number of lakhs in the population of their states. The two non-salute states will alternatively hold one seat in the council of rulers. The Union has not sent any representatives to the Constituent Assembly.

A permissive provision has been made in the Rajasthan Union Covenant under which the Dominion Legislature's jurisdiction over the Rajasthan Union approximates to the provincial level. The same is the case with Patiala and Madhyabharat. As a result of the Rajapramukh's and Minister's Conference of Kathiawar, Matsya, Rajasthan, and Vindhyapradesh held on 6-5-48 it was decided to cede to the Dominion Legislature power in respect of all matters covered by lists 1 and 3 of the 7th Schedule to the 1935 Act except those relating to taxation. These states will have to execute fresh instruments of accession on the basis of the above decision.

(5) **States recognised as viable units and continuing as Separate Entities and Small states not affected by Merger or Integration Schemes.**—The list of the former kind of states is as follows : Baroda, Hyderabad, Kashmir, Mysore, Bhopal, Kolhapur, Travancore, Bikaner, Cochin, Jaipur, Jodhpur, Mayurbhanj. The following states comprise the latter class : Benares, Cooch Berar, Jaisalmer, Khasi, Manipur, Rampur, Sandur, Tehri-Garhwal, Tripura.

(6) **Hyderabad, Kashmir, Junagadh & Bhopal**: (*a*) *Hyderabad.*—This is the largest Indian State in point of population though in respect of area Kashmir scores over Hyderabad (the area of Hyderabad is 82,313 square miles while that of Kashmir is 84,471 ; the population of the former is 1,63,38,534 while that of the latter is 40,21,616 ; Mysore with an area of 29,458 square miles has a population of 73,29,140 and Travancore with a population of 60,70,018 holds the third rank in respect of population). The history of Hyderabad has been well traced in the *White Paper on Indian States*, pp. 9 to 11. The ruling house of Hyderabad was established by Asaf Jah, an officer of the Mogul Emperor in 1713. The rulers continued to own nominal allegiance to the Mogul Emperor. The Nizam at first sought French protection but by a treaty of 1766 he placed himself under British protection. After some flirtation with Hyder Ali the Nizam, by the Treaty of Masulipatam of 1768, entered into a subsidiary alliance with Britain. A few years later the Nizam was engaged in a disastrous war with the Mahrattas who finally vanquished him in the Battle of Kurdla. After an interlude of alliance with the French, the Nizam finally veered round to the British in 1798 during the time of Wellesley. Then the Nizam purchased military protection by ceding a portion of his territory to the British. In 1803 after the war with the Mahrattas the Nizam got back a greater part of Berar which he had lost after the Battle of Kurdla. Such being Hyderabad's history the attempt of the Nizam and his enterprising advisers to ' forge it into an instrument of independence ' (to quote from the *White Paper on Hyderabad*, p. 11) is a somewhat remarkable performance. The Standstill Agreement of 29th November 1947 (which was to remain in force for one year) continued all existing agreements and administrative arrangements as to matters of common concern . In consequence of the alleged violation of the Standstill Agreement by the Nizam, successful police action was taken in September 1948 against it and the State is now under a military Governor. The proposal is to set up a responsible and representative government soon replacing the military administration and to ascertain the views of the people through the Constituent Assembly which is proposed to be set up and which will contain chosen representatives of the people. The Constituent Assembly will decide the future relationship

between India and Hyderabad. The Standstill Agreement of November 1947 is likely to be replaced by an agreement of a more permanent character subject to ratification by the Constituent Assembly.

(*b*) *Junagadh.*—It is proposed to hand over the administration of Junagadh to the Saurashtra Union by the end of December 1948. The states of Junagadh, Manavadar, Mangrol, and Bahariawad will be merged with Saurashtra for purposes of administration. The question of a political merger of these states with Saurashtra still remains open since the status of Junagadh has yet to be decided by the United Nations to which reference has been made by Pakistan. It may be mentioned that Junagadh is now being administered by the Government of India and a plebiscite will be held to decide the future of the State. The State has sent its representative to the Constituent Assembly.

(*c*) *Kashmir.*—Kashmir has acceded to the Indian Union and military action is still going on there to clear Kashmir from the raiders from adjoining territory. The dispute between India and Pakistan on this issue was referred to the U.N.O. whose Commission visited Kashmir in July 1948 and the State has not sent representatives to the Constituent Assembly.

(*d*) *Bhopal.*—Bhopal alone of the acceding states has not sent its representatives to the Constituent Assembly.

(7) **The Future.**—The situation has been thus well summed up by the *White Paper on Indian States*, p. 29 : ' The policy of the Government of India towards the Indian States has been.....the integration of all elements in this country into a free united and democratic India..... The process of the integration of the States into viable and sizable units.....solved the cross-jurisdictional puzzle of the vast assemblage of Kathiawar States and how far it has simplified the problem of the States would be evident from the fact that as against 600 or so of the units known as states which existed about the middle of December 1947, within a period of a month or two the number of the States is likely to be even less than 1/25th of the original figure ..... When the paramountcy of the Crown lapsed.....most of the states were inchoate and illusory and had hardly gone beyond the provincial legislature under the Montagu-Chelmsford Reforms. During recent months however practically every state has announced its intention to grant full responsible Government and in a vast majority of them power has already been transferred to the people..... By their patriotic co-operation and their ready appreciation of the aspirations of the people.....the Princes made integration of States.....and transfer of power to the people smooth and peaceful.....and they may well claim to be architects in building a free and democratic India in which the people of the provinces and the people of the States will enjoy alike the full measure of freedom and march together as citizens of free India.'

(8) **General.**—An Expert Committee under the Chairmanship of Sir V. T. Krishnamachariar, Dewan of Jaipur State, has been appointed to examine the existing taxation and financial structures in the Unions of States and to consider whether the States and the Unions of States should not, in financial matters, be brought into a position similar to that of the provinces so that there might eventually emerge a uniform system of federal finance throughout India and if so to suggest the manner in which such an objective could best be achieved. The Extraprovincial Jurisdiction Act 47 of 1947 replaces Ordinance 15 of 1947 which is repealed by S. 7 of the former Act. The Act empowers the Central Government to exercise in the areas outside the provinces of India jurisdiction and powers acquired or that may be acquired by the Central Government by treaties, agreements, grant, usage, sufferance and other lawful means and validates action already taken by the Central Government and its officers. See Notification No. 134-I B dated 28th January 1948 under the above Act.

Appendix C

FUNDAMENTAL RIGHTS

(1) **Historical Basis of Fundamental Rights.**—The doctrine of fundamental rights has been subjected to a brilliant analysis by Prof. M. Venkatarangaiya in his book '*Fundamental Rights of Man*' and his view is that its origin can be traced to the British, French, and American Revolutions. These revolutions were aimed at replacing the existing system of governments by governments which embodied certain fundamental rights. The American Revolution was a revolt against inequality and privilege, the privilege claimed by Englishmen living in England to regulate the life of Englishmen living in America. The doctrine passed through two stages in the course of its history. Before World War I economic and social rights and the right of association were not regarded as fundamental and their absorption into the list of fundamental rights is a post-World War I development. While the doctrine in its earlier phase called only for negative action from the Government action which was expressed technically through the phrase '*Laissez-faire*' it demanded positive action from the Government in its later phase. Burke and Bentham wanted that instead of cataloguing Man's rights his plain duties must be enforced and this criticism finds expression in some later constitutions, for example, the constitution of the Weimar Republic, article 133 of which makes it obligatory on citizens to undertake personal service for the State and local authorities. The first place in the list of fundamental rights is given to the right of men to choose their own ruler. This was the powerful counterblast to the theory of Divine Right put forward by despotic monarchs like Charles I of England. The right to hold rulers responsible for their conduct naturally flows from the first and from this again the right of freedom of thought and of opinion emerges as a logical corollary. The right to resist rulers who indulge in misrule is another right and the right to bear arms is intimately connected with the right to resist oppression. As against the above political and public rights of man there are the private or civil rights of man, namely, the right to personal freedom including the right to freedom of religious belief and worship, and the right to freedom of thought and opinion, the right to possession and use of property, and the right to equality. The right to personal freedom is embodied in the famous clause 39 of the Magna Carta: 'No freeman shall be taken or imprisoned or dispossessed or outlawed or banished or in any way destroyed nor will we go upon him nor send upon him, except by the legal judgment of his peers or by the law of the land.'

It is proposed to deal with the various fundamental rights like right to personal freedom, right of association, right to property etc., and to devote a special section to the Rule of Law which Dicey has made so famous. A criticism of the doctrine of fundamental rights follows and then the duties of citizens will be dealt with in a separate section and the chapter will close with a consideration of how fundamental rights have been dealt with in some recent constitutions like those of Japan, Italy, France etc., and with a section on civil liberties in emergencies.

(2) **Right to Personal Freedom.**—Whereas in other constitutions like the Belgian Constitution freedom of the person and other freedoms are guaranteed by general declaration of rights which are often ineffectual in practice, under the English constitution these freedoms are enforced by concrete remedies, namely writs the issue of which the aggrieved party can compel. A general warrant is one that does not name the person to be arrested, is illegal. This was decided in *Leach* v. *Money* (1765) 10 St. Tr. 1002. The Habeas Corpus Acts 1679 to 1862 also form another bulwark of civil liberties in England. The defects of the first Act of 1679 were that there was no protection where the bail was fixed too high, the return to the writ might not be truthful,

and illegal civil detention was ignored. The Act of 1816 extended the writ to cover cases of civil detention. The writ runs to the Channel Islands and Isle of Man but it cannot issue into a British Colony or an overseas dominion of the Crown under the Act of 1862. These Acts were necessitated by the fact that before 1679 the writ of habeas corpus was evaded on various grounds. For example in *Darnel's case* (1627) 3 St. Tr. 1, the judges held that the Royal Command was sufficient justification for detention. Change of prison quarters was held in *Jenkes's case* 6 St. Tr. 1190 to exempt the governor of the prison from liability for not delivering the prisoner. Some of these civil liberties may be suspended or diluted in times of emergency for security purposes. In *R.* v. *Halliday ex parte Zadig* (1917) A.C. 260 Lord Finlay, L.C. and Lords Dunedin, Atkinson and Wrenbury upheld the validity of internment without trial which was authorised by Regulation 14-B of the Regulations framed under the Defence of the Realm Consolidation Act, 1914. Lord Shaw dissented remarking ' No such repeal of ancient liberties at once so sweeping and so covert has ever been accomplished in the modern history of this island. That Parliament should have entertained such an intention of repeal I do not believe ; that it would have recoiled from putting such an intention of repeal into words I can well understand.' *Secretary of State for Home Affairs* v. *O'Brien* (1923) A.C. 603 arising out of detention under the Restoration of Order in Ireland Act, 1920 (impliedly repealed by the Irish Free State Constitution Act, 1922) is also an interesting case which decides that the writ of habeas corpus can be directed to the Home Secretary and that an appeal does not lie from a decision that a detention is illegal even though no order for the discharge of the prisoner from custody is made. In *Liversidge* v. *Sir John Anderson* (1942) A.C. 206, Regulation 18-B of the Defence Regulations framed under the Emergency Powers (Defence) Act, 1939 authorised the Home Secretary to detain any person if he had reasonable cause to believe that person to be of hostile origin or associations. In May 1940 the Home Secretary made an order of detention against one Liversidge (*alias* Perlzweig). The majority of the House of Lords, Lord Maugham, L.C. and Lords Macmillan, Wright and Romer, held that it was for the Home Secretary alone to decide in the forum of his own conscience whether he had reasonable cause of belief and if he had acted in good faith he could not be called on to disclose to anyone the facts and circumstances which had induced his belief or to satisfy anyone but himself that those facts and circumstances constituted a reasonable cause of belief. There could be no clearer evidence of the intention of Parliament to authorise the abrogation in the public interest and at the absolute discretion of the Secretary of State of the ordinary law affecting the liberty of the subject. Lord Atkin dissented in the following words which will live as long as English Law lives : ' I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the Executive..... In this country amid the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of the King's Bench in the time of Charles I.' The same principle was affirmed in *Greene* v. *Home Secretary* (1942) A.C. 284 but in the later case the Home Secretary had filed an affidavit setting out a number of particulars and stating that he had acted on information from responsible and experienced persons, and hence in this case Lord Atkin had no difficulty in siding with his colleagues. See also *Budd* v. *Anderson* (1943) K.B. 642 and *R.* v. *Home Secretary ex parte Budd* (1942) 2 K.B. 14 (C.A.). Keith (Journal of Comparative Legislation Vol. 24, pp. 63-64), Holdsworth 58 L.Q.R. pp. 1-3.

Goodhart, *Ibid.*, pp. 3 to 8, and 243 to 246, are in favour of the *Liversidge decision* while Allen in 58 L.Q.R. pp. 232 to 242 Keeton (5 Mod Law Review pp. 162 to 173) are against it. Jennings in his *The Law and the Constitution* (3rd edn., pp. XXX to XXXI) adopts a neutral attitude. In India also similar principles have been followed. S. 2 (2) para. 10 of the Defence of India Act 1939 authorised the making of rules to provide for the detention of persons reasonably suspected of being of hostile origin or of having acted in a prejudicial manner. It was held by the Federal Court in *Keshav Talpade* v. *Emperor* (1943) 2 M.L.J. 90 by the Federal Court that Rule 26 of the Defence of India Rules which provided for the detention of persons with respect to whom the Central or Provincial Government was satisfied that they were acting in a prejudicial manner went beyond S. 2 (2) of the Defence of India Act 1939 and that the detention under Rule 26 was therefore illegal. The Privy Council in *Sibanath Banerjee* v. *Emperor* has taken a different view as to Rule 26. See p. 67 *ante*.

(3) **Right to Freedom of Property.**—This right is expressed by the 5th Amendment to the U.S. Constitution which lays down that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation. The Resolution of the Indian National Congress of 1933 on Fundamental Rights also provides that the dwelling or property of a person shall not be entered, sequestrated or confiscated save in accordance with law. See Chapter XV, Topic 6 (*g*) *ante*. To-day in America due process of law by judicial interpretation has come to mean the approval of the Supreme Court. See Corwin *What the Constitution means today* (8th edn., p. 165). The question has recently arisen in England as to whether documents found in the possession of a person lawfully arrested on a certain charge which constitute material evidence against other persons on any criminal charge and not of the arrested person having committed the offence with which he is charged can be lawfully seized and Horridge J. in *Elias* v. *Pasmore* (1934) 2 K.B. 164 has answered the above question in the affirmative. See Wade *Police Search* 50 L.Q.R. pp. 354 to 367.

(4) **Right of Association.**—There is the right to hold a public meeting, that is meeting held for the purpose of discussing or expressing views on matters of public interest and which the public or any section thereof is invited to attend. There is a general right to promote or take part in a public meeting on private premises and to promote or take part in a public procession provided the rules relating to sedition, unlawful assembly, riot, public nuisance, and trespass are not infringed. For persons to constitute an unlawful assembly they must have an intention to cause a breach of the peace; it is not enough if they have reason to believe that there will be such a breach of the peace in consequence of their action. See *Beatty* v. *Gilbanks* (1882) 9 Q.B.D. 308. The above case affords no protection to a charge of obstructing a police officer in the execution of his duty. See *Duncan* v. *Jones* (1936) 1 K.B. 218 and Wade 6 Camb. L.J. pp. 175 to 181.

(5) **Right to Equality.**—As Professor Jennings observes in his '*Law and the Constitution*' (3rd Edn., p. 49): 'Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be the same for all citizens of full age and understanding without distinction of race, religion, wealth, social status, or political influence.' It merely means that one man should not merely be used as an instrument for satisfying the needs of another and that the good things of life, like wealth, comfort, power, and influence should not be monopolised by the small minority who constitute the privileged class whether on the basis of birth, religion, or on any other basis. The right to equality has nothing to do with the law of status.

(6) **Rule of Law.**—Dicey in his '*Law of the Constitution*' (9th Edn.) used the above term in three senses, namely: (i) No man is punishable or can be

lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the courts of the land. (ii) Every man whatever be his rank or condition is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals. (iii) The general principles of the constitution, for example the right to personal liberty or the right of public meeting, are in England the result of judicial decisions determining the rights of private persons in particular cases brought before the courts ; whereas under many foreign constitutions the security such as it is given to the rights of individuals results or appears to result from the general principles of the constitution. Professor Jennings in his '*Law and the Constitution*' (2nd Edn., pp. 284 to 297) has made a brilliant and well-reasoned attack on the above three aspects of Dicey's article of faith. His verdict on the first point is as follows : ' If then the rule of law means only that powers must be derived from the law, all civilised states possess it. If it means the general principles of democratic government, it is unnecessary to mention it separately. If it means that the state exercises only the functions of carrying out external relations and maintaining order it is not true. If it means that the state ought to exercise these functions only, it is a policy for Whigs (if there are any left).' The supremacy of the regular law is a myth because a man can be compelled to serve on a jury and can be convicted for contempt of court, and imprisoned for an indefinite period. Equality before the law, that is the principle that an official is subject to the same rules as an ordinary citizen, is also disproved by Prof. Jennings. A sanitary inspector can enter my house to inspect my drains though my employer cannot. When Dicey was writing about equality he was having in mind the liability of public officers for torts and other wrongs. He was not thinking of the duties of public authorities. As Prof. Jennings says ' The fact that France has and England has not an effective system for controlling administrative authorities is a strange reason for suggesting that England knows no administrative law but has a rule of law instead.' Dicey's third point is thus disposed of by Prof. Jennings : ' It is equally true that the law of the land is the result of the constitution. The fundamental principle of the law is the power of Parliament which came by a political movement and which was then recognised as law. In this sense the law determines the constitution though the constitution determines the law. Law and constitution cannot be separated.' The only thing that strikes any observer as regards this controversy and which one may submit with respect is that the meaning which Dicey attributed to the terms ' regular law ' and ' arbitrary power ' are no longer the meanings which we associate generally with these terms and he cannot be found fault with for not possessing prevision. One of the powers which is really supreme in England is unquestionably the judiciary and it can if it so chooses accord the imprimatur of its authority to the most lawless laws and make them valid. That the English High Court wields a power which is no less than that of the U.S. Supreme Court is a strange but nevertheless true fact.

(7) **Criticism of the Doctrine of Fundamental Rights.**—The first criticism is that bills of rights are mere stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservation of rights not surrendered to the Prince. They can have no application to constitutions professedly founded upon the power of the people, since under such constitutions the people surrender nothing. This objection can be answered thus : because democratic legislatures might trample on rights of individuals and minority groups, it is necessary to convert ethical maxims into political principles and incorporate them in a written constitution. The other criticism is that Government may interfere with rights not enumerated. This is also an imaginary fear. There is also the criticism that in countries not having judicial review these rights may not be effective. The remedy is to provide judicial review. Rights demanding positive action from government may not secure effectiveness because of the neglect and indifference of legislatures. The German constitution lays down that provision should be

made for the education of the young by means of public institutions. It would be futile to get a decree from court to enforce this provision if the government does not move in the matter. Some people are also of the view that fundamental rights strengthen the forces of conservatism and act as guardians of vested interests. The doctrine is also held responsible for the large amount of legislative authority that judges come to exercise in passing judgment on the constitutionality of ordinary laws. They constitute a third chamber of the legislature. In spite of all the above considerations, Prof. Venkatarangaiya opines that it is not likely that the doctrine will be easily abandoned.

(8) **Duties of Citizen.**—The large volume of literature that has grown upon the subject of fundamental rights has had the effect of throwing into the shade the no less important subject of the duties which every citizen owes and the performance of which is as essential for the wellbeing of society as the exercise of those rights. British subjects everywhere owe a natural and permanent allegiance to the Crown, and aliens within the King's dominions owe a local or temporary allegiance. There is a general common law duty to serve the Crown when called upon, for example as sheriff. There is also the prerogative power to impress seamen into the Navy. Persons may be called upon to serve on juries and to assist in suppressing riots and other violent outbursts of disorder. The duty to appear as witnesses in criminal trials and civil actions is also well known.

(9) **Fundamental Rights in some Recent Constitutions.**—(*a*) *Japan.*—The Japanese Constitution which was promulgated on 3-11-46 and became effective on 3-5-47 having received the approval of the Japanese Diet (See for text, *United States Department of State Publication* 2836 *Eastern Series* 22) contains a long list of fundamental rights in Chapter 3, Articles 10 to 36. The right to choose and dismiss public officials, the right to freedom of thought, conscience and religion, to peacefully petition for the redress of damage, and to secrecy of ballot, are guaranteed. Freedom to choose and change one's residence, academic freedom and the right of marriage based only on mutual consent, are granted. The right to receive an equal education, to work, to organise, bargain and act collectively are recognised. The right of the people to be secure in their homes, papers and effects against entries, searches and seizures, is provided for in Article 32. Torture and cruel punishments as well as the exploitation of children are prohibited. No person can be compelled to testify against himself or be convicted where the only proof is his own confession.

(*b*) *China.*—The Constitution of the Republic of China adopted by the National Assembly on 25-12-46 also contains a long list enumerating the rights and duties of citizens in Chapter 2, Articles 7 to 24. The following freedoms are recognised: Of domicile and change of domicile, of speech, teaching, writing and publication, of secrecy of correspondence, religious belief, of assembly and of forming associations. Civilians are not to be subject to the jurisdiction of military courts. The following rights are guaranteed : The right to exist, the right to work, and the right to property, to present petitions, lodge complaints and institute legal proceedings, to exercise the powers of election, recall, initiative and referendum, to take part in state examinations and to hold public office, and to receive education. The constitution also imposes certain duties on citizens namely of paying taxes performing military service, receiving education. All other rights not enumerated above and not detrimental to social order and public interests are also protected. In the case of violation of the above rights the injured person can also get compensation from the State.

(*c*) *France.*—The French Constitution of 4-9-46 contains an imposing list of fundamental rights, in the preamble. The right to obtain employment and the right to strike are conceded. The equality of the sexes is also provided for. The nation ensures to individuals and families the conditions required

for their development. To the child, the mother and to old workers the protection of health, material security, rest, and leisure are guaranteed. Those who find themselves unable to work have the right to obtain from the collectivity decent means of existence. The nation proclaims the solidarity and equality of Frenchmen before the burdens resulting from national calamities. The French Republic will not engage in any war for the purpose of conquest and contingent on reciprocity. France accepts those limitations to sovereignty necessary to organise and defend peace.

(*d*) *Italy*.—The new Italian Constitution which came into force on 1-1-48 has also a programmatic content (directive principles) laying down the basic principles of future legislation.

(*e*) *Burma*.—In the Burmese Constitution adopted on 44-9-47 there is a separate Chapter (3) dealing with the right of peasants. The state is the owner of all lands and the maximum size of private holdings is to be determined by law. Chapter 4 deals with the directive principles of state policy. See an article by Sir B. N. Rau on the Burmese Constitution in the "*India Quarterly*" April 1948 Issue.

(*f*) *India*.—It would have been futile to look for any enumeration of fundamental rights in the 1935 Act because it was the joint work of the British, the Indian Princes, and the Muslim League and the masses of India and their representatives had no hand in shaping it. Sir Samuel Hoare explained in Parliament the difficulty of putting any fundamental rights into the 1935 Act thus : 'The difficulty is that you cannot put in anything sufficiently explicit to make it (the fundamental right) susceptible of a legal decision and otherwise it is really the expression of a pious opinion.' The only two fundamental rights found in the 1935 Act are those covered by Ss. 198 and 299. See Chapter XV topic *ante*. The position is now different because the Constitution of India is being framed by the chosen representatives of the people. The Draft Constitution in fact bristles with these rights. Part 3, Articles 7 to 17 deals with the justiciable rights and Part 4, Articles 28 to 40 deals with directive principles of state policy. The right of equal access to public places like wells, roads, and other places of public resort is guaranteed. Untouchability in any form, and titles are abolished. The right to speak freely, assemble peaceably, to form associations, to move freely, to acquire land etc., to practise any profession, are recognised. Retrospective criminal laws are prohibited and freedom of person and property are regarded as inviolable. Freedom of conscience and the right freely to profess, practise, and propagate religion are recognised. Religious instruction shall not be provided by the State in any educational institution wholly maintained out of state funds. The right to constitutional remedies is recognised. The right to work, to education, and to public assistance in the case of unemployment figure among the directive principles. A living wage and conditions of work ensuring a decent standard of life also find a place in Part 4. The imparting of free primary education, the promulgation of a uniform civil code, the protection of ancient monuments, the raising of the level of nutrition, and the promotion of internationl peace and security are other examples of objectives which the State should strive to promote and achieve. Dealing with the criticism that the fundamental rights in the Draft Constitution were riddled with too many exceptions, Dr. Ambedkar, the Chairman of the Drafting Committee-appointed by the Constituent Assembly to draft the Constitution, observed in the course of his speech on 4-11-48 in moving for the consideration of the Draft that what the Draft had done was that instead of formulating fundamental rights in absolute terms and depending upon the Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permitted the State directly to impose limitations on those rights. The necessity for Part 4 was also vigorously canvassed by Dr. Ambedkar in the course of the same speech. The directive principles were Instruments of Instructions to the Legislature and the Executive. Whoever captured power would have to respect those directives. He could

not ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles have will be realised better when the forces of right contrive to capture power. As to the wisdom of laying down directive principles, see (1948) F.L.J. 13 (Jour.).

(10) **Civil Liberties in an Emergency.**—(*a*) *Martial Law* : The suspension of civil liberties during a period of emergency like a war or insurrection is a topic on which authority is scarce and as to which informed and learned opinion is by no means unanimous. This suspension is sometimes shortly expressed by the term martial law. Martial law used in this sense must not be confused with other senses in which that word is used loosely, for example to denote the law formerly administered by the Court of the Constable and Marshall, the codes governing the armed forces at home and abroad, and the law administered by a British commander in occupied enemy territory in time of war, and possibly the law administered by a British commander in an occupied district of ex-enemy territory. 'Martial law' means the suspension of the ordinary law and the substitution therefor of discretionary government by the executive exercised through the military. In France a state of siege (*etat de siege*) is declared by the President on the advice of the Cabinet or by the Chambers if they are in session, and this involves the temporary and partial transfer of powers from the civil to the military authorities. A state of siege is declared only in the event of imminent danger resulting either from foreign war or armed insurrection. Dicey '*Law of the Constitution*' (9th Edn., p. 293) asserts that such a procedure is unknown in England. Lord Sumner in *Johnstone* v. *Pedlar* (1921) 2 A.C. 294 was also of the view that English law knew of no such thing as martial law. There has been no attempt since 1628 to exercise martial law in England and all cases relate to the exercise of martial law in the colonies. *R.* v. *Nelson & Brand* (1867) F. Cockburn Sp. Rep. and *R.* v. *Eyre* (1868) Finlason Sp. Rep. relate to Jamaica. *Clifford & O'Sullivan* (1921) 2 A.C. 570 is a decision of the House of Lords in an Irish appeal and is of binding authority in England. Two Privy Council decisions *viz.*, *Tilonko* v. *Attorney-General of Natal* (1907) A.C. 93 and *Ex parte Marais* (1902) A.C. 109 would only have a persuasive authority in England. *Wolfe Tone's Case* (1798) 27 St. Tr. 614 and *Wright* v. *Fitzgerald* (1798) St. Tr. 765 are interesting cases decided by Irish Courts and *Reg.* v. *Gildenhuys* (1900) 17 Cape of Good Hope Supreme Court Reports 266, is a South African authority. The other literature on the subject can be summed up as follows : Forsyth '*Cases and Opinions in Constitutional Law*', p. 551, *Keir & Lawson* '*Cases in Constitutional Law*' (2nd Edn., pp. 368 to 404), the article of Professor Holdsworth in 18 *Law Quarterly Review*. Some writers draw a distinction between times of war and times of peace and hold that martial law in the second case is illegal. They base their view on the Petition of Right 1628, Article VII of which (so far as it is relevant for our purposes) runs as follows : 'Whereas of late divers commissions under Your Majesty's Great Seal have issued forth by which certain persons have been assigned and appointed Commissioners with power and authority to proceed within the land according to the justice of martial law against such soldiers and mariners or other dissolute persons joining with them as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law and is used in armies in time of war to proceed to the trial and condemnation of such offenders and then to cause to be executed and put to death according to the martial law.....(X) they do therefore humbly pray your Most Excellent Majesty.....that the aforesaid commissions for proceeding by martial law may be revoked and annulled.' It would be an exceedingly wrong presumption to say that the Petition of Right in not condemning martial law in time of war sanctioned it. This is the view of Lord Blackburn in *R.* v. *Eyre* (1868) Finlason 73. Those who hold that martial law may validly be called into operation in time of war both in Great Britain and outside it, rely on the preamble to 39 Geo. 3, C. 11 (1799)

which refers to the ' wise and salutary exercise of His Majesty's undoubted prerogative in executing martial law.' The following principles can be gathered from the authorities regarding the application of martial law : (i) The ordinary courts have jurisdiction to determine as a question of fact whether a state of war exists or did exist at the relevant time in a given area so as to justify the setting up of a military tribunal—*R.* v. *Allen* (1911) 2 Ir. Rep. 241. (ii) The existence of a state of war in a given district is compatible with the continued functioning for some purposes of the civil courts within that district *Elphinstone* v. *Bedreechund* (1830) 1 Knapp 316. (iii) If it is held that a state of war does exist the military tribunal not being a court but merely military officers to advise the military commander would not be bound by the ordinary law or procedure. Prohibition would not lie—*Clifford & O'Sullivan* (1911) 2 A.C. 570. (iv) An act of indemnity is no defence where the conduct sought to be justified was not *bona fide* directed to the suppression of the insurrection—*Wright* v. *Fitzgerald* (1798) 17 St. Tr. 765. (v) Where there is no act of indemnity the Commander-in-Chief would be protected if he had acted *bona fide* and all his acts were done solely with a view to suppressing the insurrection. He need not as Dicey laid down prove an immediate necessity for every act. (vi) Subordinates will not be liable for obeying orders which are not obviously illegal. There can be no better postscript to the discussion of the topic of martial law than the following quotation from Dicey (*Law of the Constitution*, 9th Edn., p. 293): 'Martial law is in England utterly unknown to the constitution. Soldiers may suppress a riot as they resist an invasion, they may fight rebels just as they fight foreign enemies but they have no right under the law to inflict punishment for riot or rebellion.' *Wolfe Tone's case* affords a splendid illustration of the supermacy of the law over the decisions of arbitrary military tribunals. In 1798 Wolfe Tone, an Irish rebel, took part in a French invasion of Ireland. He was sentenced to be hanged by a court martial in Dublin. He held no commission as an English officer, his only commission being one from the French Republic. The court of the Irish King's Bench issued a writ of *habeas corpus* directing his release on the ground that martial law was sought to be enforced illegally.

(*b*) *Statutory Powers to deal with an Emergency.*—(i) In time of Peace : The Emergency Powers Act 1920 a permanent statute is one such example and is designed to meet an emergency such as the coal strike of 1921, or the general strike of 1926. When a proclamation of emergency is made by His Majesty, His Majesty may make regulations for securing the essentials of life to the community.

(ii) In time of War : It would take a lot of space to enumerate all the emergency laws and regulations made to deal with the emergency created by the Second World War. The Emergency Powers (Defence) Acts 1939 and 1940 were the pivots round which the whole of the large mass of regulations framed under them revolved. The 1940 Act has been described by Dr. Jennings as ' putting into a legal formula the blood, tears, and sweat that Mr. Churchill had promised as the British contribution to the war effort ' (*Law and the Constitution*, 3rd Edn., pp. xxv–xxvi). One curious regulation may be noticed, that is that under the Defence (General) Regulations 1939, which made it an offence to publish any report or statement relating to matters connected with the war which was likely to cause alarm or despondency. This regulation was generally regarded as a bad joke and was discontinued on the initiative of Mr. Churchill when the danger of invasion was over. See the latest Act, the Requisitioned Land and War Works Act 1945 which gives the Government wide powers of compulsory purchase of land on which buildings etc. have been erected at public expense for the purposes of the war.

Supplement up to 1st July 1949

P. 11 line 6: Bombay Act 57 of 1947 constituted the Small Cause Court, Bombay as the sole court to try suits between landlords and tenants relating to recovery of rent to possession of any premises. This took away the ordinary original jurisdiction of the Bombay High Court. Held the Act was *intra vires* because it was covered by items 2 and 21 in list 2. The power of the High Court to make rules under S. 224 (1) (*b*) can be exercised only in the absence of laws inconsistent with such powers and hence it is perfectly valid for the provincial legislature to make rules for regulating the procedure to be followed in suits under the above Act. It is within the competence of the provincial legislature to take away a vested right of appeal to the Federal Court, in pending cases.

Hence S. 50 of the Bombay Act 57 of 1947 is not *ultra vires* because it seeks to transfer suits pending before the High Court and thus deprives the litigants of their vested right to appeal before the Federal Court. Depriving litigants of their right to go to the Federal Court in a possible contingency is not depriving the Federal Court of jurisdiction in any sense of the word. Jurisdiction of the Court and the right of the litigant to resort to it are two different things—*Kavasji Pestonji* v. *Rustomji Sorabji* A.I.R. (1949) Bom. 42 (Chagla, C.J. & Tendolkar, J.).

P. 16 Footnote 29. Pith and Substance Rule: See *Mulchand Kundanmal* v. *Raman Hiralal* 51 Bom. L.R. 86 (Chagla, C.J. & Bhagwati, J.) where the rule was considered.

P. 16 Footnote 29: A provincial legislature can legislate on preventive detention even though such legislation conflicts with the provisions of the Criminal Procedure Code. If the whole of a piece of legislation is confined to matters within the provincial legislative list that legislation or any part of it cannot be void for repugnancy because it may come into conflict with dominion laws or existing laws. With respect it is submitted that equating legislative competence with repugnancy is not quite correct. In *Kunj Bihari Kar's* case Spens, C.J., in the judgment of the Federal Court treats the question of repugnancy and *ultra vires* as two separate and distinct topics not to be confused. *Prafulla Kumar's case* also is not inconsistent with the above since *Prafulla Kumar's Case* was concerned only with the question of *ultra vires* and not with the question of repugnancy. An order made *mala fide* under powers given by an Act, ordinance, or rule is no exercise of such power but facts must be proved which establish that the orders were made *mala fide* or maliciously. Even if the court were suspicious it could not hold the orders to be *mala fide*—*Jnana Prosanna* v. *Province of West Bengal* A.I.R. (1949) Cal. 11.

P. 16 footnote 29: The recent decision of the Privy Council in *Attorney-General of Saskatchewan* v. *Attorney-General of Canada* A.I.R. (1949) P.C. 190 is somewhat revolutionary in character and is certainly not conducive towards clarifying the law on a topic on which it is already in a much confused state. The Privy Council in the above case held that the Saskatchewan Farm Security Act 1944 which lightened the contractual

obligations of mortgagors and purchasers of farm land in the event of the yield of grain grown upon the land falling below a prescribed minimum was not legislation in relation to agriculture though it might produce a favourable effect upon it. Consequential effects are not the same thing as legislative subject-matter. The theory of incidental and substantial encroachment which had been disapproved in *Prafulla Kumar Mukherjea's case* has been revived again and only another ruling of the Privy Council can reconcile or integrate these two decisions.

Page 22 Footnote 33 at the end add the text of the Government of India (Amendment) Act 1949, Act 1 of 1949.

GAZETTE OF INDIA EXTRAORDINARY, 12-1-49.

CONSTITUENT ASSEMBLY ACT NO. I OF 1949

An Act to amend the Government of India Act, 1935.

Whereas it is expedient to amend the Government of India Act, 1935, for the purposes hereinafter appearing ;

Short title and commencement—

It is hereby enacted as follows :—

1. (1) This Act may be called the Government of India (Amendment) Act, 1949.

(2) It shall come into force on the 15th day of January, 1949.

Interpretation

2. The Interpretation Act, 1889, applies for the interpretation of this Act as it applies for the interpretation of an Act of Parliament.

Amendment of section 8 of the Government of India Act, 1935

3. In section 8 of the Government of India Act, 1935 (hereinafter referred to as the said Act),—

(*a*) in clause (i) of the proviso to sub-section (1), after the words " in this Act ", the words " or in any law made by the Dominion Legislature with respect to any of the matters specified in the next succeeding sub-section ", shall be inserted ; and

(*b*) after sub-section (1), the following sub-section shall be inserted, namely :—

" (1A) The matters referred to in clause (i) of the proviso to sub-section (1) of this section are—

(a) industrial and labour disputes ;

(b) trade and commerce in, and production, supply and distribution of, products of industries the development of which is declared by Dominion law to be expedient in the public interest ;

(c) the sanctioning of cinematograph films for exhibition ; and

(d) inquiries and statistics for the purpose of any of the matters in the Concurrent Legislative List."

Insertion of new section 61A

4. After section 61 of the said Act, the following section shall be inserted, namely :—

"61A. *Extension of term of office of members of Provincial Legislative Councils.*—Notwithstanding anything contained in this Act, the Governor may, in the case of a Province having a Legislative Council, extend the term of office of a member of the Council, who is due to retire under sub-section (3) of section 61 of this Act, for such period as he thinks fit and may, in making such order, give such incidental and consequential directions as he may deem necessary."

Amendment of section 101

5. In section 101 of the said Act, before the words " Nothing in this Act " the words, figures and letter " Save as provided in section 290A " shall be inserted.

Insertion of new sections 290A and 290B.

6. After section 290 of the said Act, the following sections shall be inserted namely :—

"290A. *Administration of certain Acceding States as Chief Commissioner's Province or as part of a Governor's or Chief Commissioner's Province.*—(1) Where full and exclusive authority, jurisdiction and powers for and in relation to the governance of any Indian State or of any group of such States are for the time being exercisable by the Dominion Government, the Governor-General may by Order direct—

(*a*) that the State or the group of States shall be administered in all respects as if the State or the group of States were a Chief Commissioner's Province ; or

(*b*) that the State or the group of States shall be administered in all respects as if the State or the group of States formed part of a Governor's or a Chief Commissioner's Province specified in the Order :

Provided that if any Order made under clause (*b*) of this subsection affects a Governor's Province, the Governor-General shall before making such Order, ascertain the views of the Government of that Province both with respect to the proposal to make the Order and with respect to the provisions to be inserted therein.

(2) Upon the issue of an Order under clause (*a*) of sub-section (1) of this section, all the provisions of this Act applicable to the Chief Commissioner's Province of Delhi shall apply to the State or the group of States in respect of which the Order is made.

(3) The Governor-General may in making an Order under sub-section (1) of this section give such supplemental, incidental and consequential directions (including directions as to representation in the Legislature) as he may deem necessary.

(4) In this section, reference to a State shall include reference to a part of a State.

290B. *Administration of areas included within a Governor's Province or a Chief Commissioner's Province by an Acceding State.*—(1) The Governor-General may by Order direct that any area included within a Governor's Province or the whole or any part of the area included within a Chief Commissioner's Province shall be administered in all respects by a neighbouring Acceding State as if such area formed a part of such State and thereupon the provisions of this Act shall apply accordingly :

Provided that where any such Order is made with respect to any area included within a Governor's Province, the Governor-General shall, before making such Order, ascertain the views of the Government of that Province both with respect to the proposal to make the Order and with respect to the provisions to be inserted therein.

(2) An Order made under sub-section (1) of this section may contain such supplemental, incidental and consequential provisions (including provisions for varying the representation in the Legislature) as the Governor-General may deem necessary."

Amendment of the Seventh Schedule

7. In the Seventh Schedule to the said Act,—

(*a*) for paragraph 34 of the Federal Legislative List, the following paragraph shall be substituted namely :—

"34 Development of industries, where development under Dominion control is declared by Dominion law to be expedient in the public interest ; regulation and control of such industries." ;

(*b*) for paragraph 27 of the Provincial Legislative List, the following paragraph shall be substituted, namely :—

"27. Trade and commerce within the Province, subject to the provisions in paragraph 31A of List III ; markets and fairs ; money lending and money lenders.";

(*c*) for paragraph 29 of the Provincial Legislative List, the following paragraph shall be substituted, namely :—

"29. Production, supply and distribution of goods and development of industries, subject to the provisions in paragraph 31A of List III." ;

(*d*) after paragraph 31 of the Concurrent Legislative List, the following paragraph shall be inserted, namely :—

"31A. Trade and commerce in, and production, supply and distribution of, products of industries, the development of which is declared by Dominion law to be expedient in the public interest under paragraph 34 of List I."

P. 33 line 18 from bottom : Salaries of Ministers of the Dominion : The Salaries of Ministers Act 53 of 1947 fixes the salaries of ministers of the Dominion at Rs. 3,000 per mensem with a sumptuary allowance of Rs. 500 per mensem. Ministers are also entitled to fully furnished residences in New Delhi throughout their term of office and for a period of fifteen days immediately thereafter and fully furnished residences in Simla for such period or periods during the summer season of each year as the Governor-General may by general or special order determine.

P. 35 line 8 : See Government of India (Amendment) Act 1 of 1949 p. 22 footnote 33.

P. 47 last line: Where the question involved is whether the U.P. Maintenance of Public Order Act of 1947 has been correctly applied to a particular case or not and not whether the Act is itself *ultra vires* the Provincial Legislature no question as to the interpretation of the 1935 Act arises justifying the grant of a certificate under S. 205—*Rex.* v. *Amir Hassan* (Kania, C.J., Mahajan, Fazl Ali, Patanjali Sastri & Mukherjea, JJ.) 4 D.L.R, (F.C.) 69. See also 4 D.L.R. (F.C.) 61.

P. 47 line 16 from bottom : S. 205 (1)—Certificate under—Granting of—Justification. No final adjudication as to liability under criminal law—Decision on a question of jurisdiction.

Where there has not been a final adjudication of the right of the parties, that is the liability in criminal law of the parties, the fact that an important point of jurisdiction has been decided is not enough to justify the grant of a certificate under S. 205 (1) of the Government of India Act. (Rajagopalan, J.) *Tonse, In re.*

P. 63 end of first para : Rule 179 of the Legal Department Manual C.P. 1941 provided that where the application for consent to the institution of a suit under S. 92, Civil Procedure Code was disposed of by the Advocate-General or Deputy Commissioner no fresh application relating to the same matter should be entertained

by either officer. This rule cannot restrict the power of the Advocate-General. It is merely a departmental instruction to the two authorities not to entertain a fresh application when either has already dealt with the matter. It is nothing more than the tender of advice to the two as to how they should proceed. S. 55, Government of India Act, 1935 does not invest the Governor of a province or the provincial Government with right to override a statute. It merely invests them with power to define what legal duties the Advocate-General has to perform with relation to the Provincial Government. Neither S. 55 nor S. 59 authorise the Provincial Government to override the Code of Civil Procedure by rules framed under it. When once sanction has been refused by the Collector it cannot make the Advocate-General *functus officio* to entertain a fresh application in that behalf and accord sanction Bose & Sen, JJ. (obiter) *Puranmal Fattechand* v. *Jagannath Hansraj*, A.I.R. (1949) Nag. 183.

P. 64 end : As soon as an order is tendered and it is expressed in the name of the Governor and duly authenticated as provided by the rules framed under S. 59 it is not open to a Court of Law to question the authenticity of the order to the extent that the order is the order of the Provincial Government. Exfacie the order must be accepted and the court must proceed on the assumption that the order is an executive order issued by the Provincial Government. It is not open to a party to challenge a particular order which the Provincial Government chooses to issue as an executive order as not being an executive order but some other order. Whether the Government is entitled in law to issue an executive order or not is entirely a different matter and S. 59 does not in any way take away the liberty of the subject to challenge orders of Government as being bad or invalid or *ultra vires* on the ground that certain provisions of law called for judicial orders and not executive orders—*P. V. Rao* v. *Ahmad Haji*, A.I.R. (1949) Bom. 125 (Chagla, C.J. & Gajendragadkar, J.).

P. 64 end of 1st para: Where the rules of business made by the Governor under Sec. 59 (2) and (3) of the Government of India Act, provide for an instrument or order of the Governor being signed or authenticated by, *inter alia*, an Under-Secretary to the Government of the Province, it cannot be held that an order signed by an Additional Under-Secretary is not duly authenticated and hence is illegal. An additional Under-Secretary does not cease to be an Under-Secretary because of the addition of the word "Additional"; that word has reference only to the number of persons holding the same designations of office. An Additional Under-Secretary is therefore an Under-Secretary for purposes of S. 59 and the rules of business made thereunder, and is competent to authenticate an order of the Governor and an order authenticated by him is a legal and

valid order and not defective or bad. (Das and Narayan, JJ.) *Siddique Ali* v. *Province of Bihar,* 4 D.L.R. (Pat.) 28.

P. 66 line 9 : The proviso to S. 1 (3) of the Bihar Act 5 of 1947 empowers the provincial Governments to extend the Act for one more year, if both chambers of the provincial legislature pass a resolution to that effect. When the Governor-General gives his assent to the Act he is not delegating his power of assent but only assenting to it conditionally—*Nek Mohammed* v. *Province of Bihar,* A.I.R. (1949) Pat. 1 (Meredith, Sinha & Das, JJ.).

P. 66 footnote 58 See Government of India (Amendment) Act 1 of 1949. P. 22 footnote 33.

P. 67 Footnote 58(*a*) In *Jnana Prosanna* v. *Province of West Bengal,* A.I.R. (1949) Cal. 1 (13) Harries, C.J., takes the view that an ordinance can repeal or amend existing legislation. He followed *Sibnath Banerjea* v. *Porter,* A.I.R. (1943) Cal. 377=208 I.C. 493 (S.B.).

P. 67 line 3 : Governor's Ordinance-making Power : Governor's ordinances can amend or repeal existing laws of the provincial legislature. They can also be retrospective with effect from a date when the legislature was actually in session. The ' satisfaction ' must be the satisfaction of the Governor and the Courts cannot question the grounds upon which the Governor was ' satisfied ' even if the Governor stated the reasons which satisfied him—*Jnana Prosanna Das Gupta* v. *Province of West Bengal,* (1949) D.L.R. (Cal.) 20=A.I.R. (1949) Cal. 1=53 C.W.N. 27 (F.B.) (Harries, C.J., Mitter, Sen Clough & Chatterjea, JJ.).

P. 73 end of 1st para : The Deputy Prime Minister, Sardar Patel, will move a Bill on the opening day (16-5-1949) to further amend the Government of India Act, 1935, according to the order paper of the day. The two important changes that the Bill seeks to make, relate to regularisation of European representation in the Coorg Legislative Council and enabling the Centre to pass legislation for the inter-provincial transfer of detenus.

In August, 1947 the Government of India Act was adapted so as to eliminate European representation in legislative assemblies and councils but the fact that there were Europeans in the Coorg Legislative Council was overlooked at the time, says the statement of objects and reasons of the Bill. At present there are two Europeans in the Coorg Legislative Council and it is considered inappropriate that this anomaly should be allowed to continue. Clause Three of the Bill enables the Government to cure this anomaly.

It has been found necessary from time to time to transfer from one province to another persons detained under a Provincial Public Safety Act. The Prisoners Act, 1900 which regulates inter-provincial transfer of prisoners, does not, however, apply to detenus. The Centre is not empowered, under the distribution of subjects

at present, to pass legislation for the inter-provincial transfer of detenus. The difficulty has been got over hitherto by resort to the Bengal Regulation of 1818, but this is considered unsatisfactory. It is, therefore, proposed to make such changes as are necessary in the lists of subjects attached to the Government of India Act, 1935, as will enable legislation to be passed for the transfer of detenus from one province to another.

Page 79 end of 1st para : In *P. V. Rao* vs. *Khushaldoss S. Advani* (51 Bombay Law Reporter 342) Chagla, C.J. & Tendolkar, J. have taken a different view and held that section 306 gives immunity only to the Governor and not to the Provincial Government. "Provincial Government" means the Governor and his Ministers. Any right of suit under Chapter 3 of Part 7 of the Government of India Act 1935 cannot be defeated merely because the Governor constitutes the pivot of the Provincial Government. If *Certiorari* lies against the Province there is nothing in Section 306 which debars the Court from issuing such a *writ*.

Pp. 87 and 88 Footnote 62 : The recent decision of *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*, A.I.R. (1949) Mad. 307 (S.B.) (Rajamannar, C.J., Govindarajachari & Govinda Menon, JJ.) is a very instructive ruling as to the extent to which the provincial laws can interfere with or abridge the right of the subject to apply for *habeas corpus* on the ground of the existence of an emergency. The Madras Maintenance of Public Order Act 1 of 1947 was amended by Ordinance 2 of 1948 promulgated by the Governor of Madras on 25th May 1948. Clause 4 of the Ordinance inserted a new S. 16-A to the Madras Act 1 of 1947 as follows : 'Nothing in S. 491 subsections (1) and (2) Criminal Procedure Code, 1898 shall apply to any person detained or deemed to have been detained under S. 2 of this Act by the provincial Government or any officer or authority authorised by them in that behalf.' The following points were decided in this case (1) The legislature was prorogued on 24th May 1948 and the Ordinance was issued on 25th May 1948. The short interval between the prorogation of the legislature and the promulgation of the ordinance made it extremely improbable that the Governor could have obtained the advice of the ministers and the instructions of the Governor-General. But this fact was irrelevant because S. 51 (4) prohibited the Courts from going into the question whether or not any advice was tendered by ministers and that prohibition would equally apply to the question whether or not any advice could have been tendered by the ministers to the Governor. (2) It cannot be said that the subject-matter of S. 16-A is not covered by any of the entries in the lists of the 7th schedule. It is covered by item 2 of list 3 and items 1 and 2 of list 2. Item 2 of list 3 cannot be construed as dealing only with matters of procedure included in the Criminal Procedure Code. The word 'including' has an enlarging and not restrictive effect. Even matters not pertaining to procedure if included within the Criminal Procedure Code are covered by the entry. (3) The argument that the Madras Act minus S. 16-A deals only with matters in the provincial list and therefore S. 107 (2) will not apply to it is not sound. 'Provincial Law' does not necessarily refer to the entire statute. Any provision of a provincial Act or of a provincial law will also be a provincial law. There is nothing in any of the provisions of the Government of India Act 1935 or any general principle which would preclude the provincial legislature from dealing with both matters in the concurrent list as well as matters in the provincial list in the same enactment after taking care to comply

with the procedure laid down in S. 107 (2). (4) It is competent for the provincial legislature to take away the jurisdiction of the High Court under S.491, Criminal Procedure Code even though under the Letters Patent clause 44 only the Governor-General has the power to affect the jurisdiction of the High Court. S. 293 of the Government of India Act and Ss. 2 and 7 of the Government of India (Adaptation of Indian Laws) Order 1937 support the above proposition. (5) S. 16-A does not apply to petitions filed before 25th May 1948. The right of a suitor to have his pending application disposed of by a competent court is a matter of right and not a matter of procedure. There is no intention in the Act to make S. 16-A retrospective while in some other cases like S. 16 (2) the Act clearly gives a retrospective operation to those provisions. (6) The argument that in the case of petitions filed after 25th May 1948 the petitioners had a vested right to obtain their release by an order of the High Court under S. 491, Criminal Procedure Code which could not be taken away by a retrospective operation of S. 15-A could not be accepted. The words 'deemed to have been detained' in S. 16-A made it abundantly clear that it was intended that S. 16-A should apply to persons who had been detained even prior to the passing of the ordinance. (7) The Court has power to interfere and set at liberty a person who is being detained by an order which though purporting to be made under S. 2 of the Madras Act 1 of 1947 is not in fact such an order. This will be so in the following circumstances : (*a*) when the order is not duly authenticated as for example when it is passed by an officer or authority not empowered under S. 15 of the Act ; (*b*) when the person detained in pursuance of the order is not the person intended to be detained that is to say when there is a mistake of identity ; (*c*) when there is lack of *bona fides*; and (*d*) when it is established that the essential requirement of S. 2 namely the satisfaction of the provincial Government or an officer or other authority empowered under S. 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under S. 2 (1) of the Act is not present. If it is established that neither the provincial Government nor the officer or other authority empowered under S. 15 has exercised its or his mind on the material placed before it or him, then an order of detention though purporting to be passed under S. 2 (2) must be deemed to be not an order under S. 2.

P. 99 para 2 : See Government of India (Amendment) Act 1 of 1949 p. 22 footnote 33.

P. 105 Footnote 15 : An offence under R. 81 (4) of the Defence of India Rules read with Pipes Control Order 1942 was committed on 20th October 1944 when the Pipes Control Order 1942 was in force. The Pipes Control Order 1942 was cancelled on 30th November 1944 and the prosecution was launched on 9th November 1945. Held that the prosecution could be continued even after 30th September 1946 the date on which the Defence of India Rules and Act expired—*Dhawanji Rawji* v. *Emperor*, A.I.R. (1949) Nag. 134 (Hemeon, J.).

P. 109 end of 1st para : The question was whether the Punjab Urban Immovable Property Tax Act passed by the Provincial Legislature was *intra vires* the Punjab Legislature in as much as the tax imposed by it is on the owner and so does not fall under item 42 of List II of Schedule VII of the Constitution Act and is really, a tax on income which according to item 54 to List I of the same schedule is a federal subject.

Held : There are no words in item 42 of List II to suggest that the tax is to be paid only by the occupier and not the owner

and it is wrong to read into that item words which do not occur and thereby limit the scope and meaning of the expressions used. The mere fact that " hearths and windows " occur along with the words " lands and buildings " in item 42 does not indicate that they must all be necessarily read together and that the tax on land and buildings must be of the same nature and incidence as the tax on hearths and windows. It is quite conceivable that the tax on buildings may be levied on the owner whereas the tax on hearths and windows may be levied on the occupiers and *vice versa*. The words of the item are clear and they entitle a Provincial Legislature to impose taxes on lands and buildings, hearths and windows without reference to who has to pay the taxes.

Though the basis of the tax under the impugned Act is the annual value of the property to be taxed it cannot be said that it becomes a tax on income merely because the Income-tax Act has adopted the annual value as the standard for determining the annual value. There are other factors to be taken into consideration and it is the essential nature of the tax charged and not the nature of the machinery which is to be looked at. Section 3 which is the charging section has to be looked into because the identification of the subject-matter of the tax is only to be found in that section and in clear terms it levies not a tax on income but a tax on buildings and lands. There is nothing in the impugned Act to show that there was any intention on the part of the Provincial Legislature to get at or tax the income of the owner from the buildings. In substance the impugned tax is not a tax on income and the extent of the alleged invasion by the Provincial Legislature into the field of the Federal Legislature is not so great in this case as to justify the view that in pith and substance the impugned tax is a tax on income.

The principle that should guide a court when it has to deal with two apparently conflicting enactments are (1) that the Court must try to ascertain the pith and substance or the true nature and character of the conflicting provisions and (2) that, before an Act is declared *ultra vires* there should be an attempt to reconcile the two conflicting jurisdictions, and only if such a reconciliation should prove impossible, the impugned Act should be declared invalid.—*Ralla Ram* v. *Province of E. Punjab*, (1949) F.L.J. 8.

P. 109 last line : From a comparison of list 2 item 1 and list 1 item 1 relating to preventive detention it is obvious that the provincial Government can only pass detention orders for preventive purposes with respect to maintenance of public order. At the same time it must not be forgotten that these two kinds of preventive detention may overlap in the sense that what may appear to be preventive detention in connection with defence etc., may primarily be preventive detention for reasons connected with the maintenance

of public order. The mere fact that in the grounds for detention mention is made of relations with Hyderabad State is not enough for holding that the detention could only be provided for by legislation under list 1 item 1 of the Government of India Act. It will have to be seen in each individual case whether in spite of such reference the detention in the particular case is primarily connected with the maintenance of public order in the province. If it is so connected the fact that there is reference to war or to the Indian Union Government or to Hyderabad State would not make the detention of the nature specified in list 1, item 1 of the Government of India Act—*Noor Mohammad* v. *Rex*, A.I.R. (1949) All. 120 (Wanchoo, J.).

P. 109 last line : The expression ' public order ' in item 1 list 2 includes also public safety in its relation to the maintenance of public order. The Bihar Maintenance of Public Order Act 5 of 1947 does not encroach on item 1 of the federal legislative list which deals *inter alia* with preventive detention in British India for reasons of state connected with defence, external affairs, etc. The item may also have an aspect of public safety but of a different character altogether being connected with defence, external affairs etc., or the discharge of the functions of the Crown in its relation to the India States—*Nek Mohammed* v. *Province of Bihar*, A.I.R. (1949) Pat. (Meredith, Sinha & Das, JJ.).

P. 110 line 1 : It cannot be said that the notification of 1st March 1948, substituting the " Court of Small Causes " for the " Chief Judge of the Court of Small Causes " as the appellate authority under Section 12 of the Madras Buildings (Lease and Rent Control) Act is invalid as enlarging the jurisdiction of the Court of Small Causes otherwise than by appropriate legislation or as taking away existing rights of appeal. There is no doubt an extension of the jurisdiction of the Court of Small Causes by that notification. But the provincial legislature is perfectly competent to make this extension of jurisdiction by virtue of the power conferred on it by Section 100 of the Government of India Act read with item 2 of List II in Schedule VII to it. That this power of legislation could be delegated by the Legislature to the executive authority, that is, the Provincial Government is also clear from the decision in *King-Emperor* v. *Benorai Lal Sarma*, (1945) 1 M.L.J. 76 ; L.R. 72 I. A. 57 : 8 F.L.J. 1 (P.C.). It cannot be said that under Section 12 (1) (*a*) of Madras Act XV of 1946 what was delegated was only a power of appointment but not a power of legislation. Though that provision contemplates appointment of an appellate authority, it necessarily involves the exercise of legislative power because it may involve the extension of the jurisdiction of a Court, then impliedly the power of appointment must include such legislative power as is necessary for the purpose.

It cannot be said that all the judges of the Court of Small Causes must hear and decide appeals under the Act. Appeals under the notification under Section 12 of Madras Act XV of 1946 would also be included in the business of the Court (under Section 10 of the Presidency Small Cause Courts Act), and the Chief Judge may make such arrangements as he thinks fit for the distribution of the business of the Court among the judges thereof. Accordingly where an appeal against the order of the Rent Controller is transferred by the Chief Judge of the Court of Small Causes to the Third Judge, the Third Judge has jurisdiction to dispose of the appeal.

Quaere—How far Section 12 (4) of Madras Act XV of 1946 would affect the power of revision possessed by the High Court?

The Court of Small Causes, Madras, was constituted an appellate authority as a Court and it cannot be said that in the notification of the Government "the Court of Small Causes" meant "the three judges of the Court of Small Causes". The right of appeal as it existed before the notification has not been taken away or interfered with by the notification in question. Only the Chief Judge of the Court of Small Causes ceased to exist as an appellate authority. (Rajamannar, C.J. and Viswanatha Sastri, J.). *Venugopal Naidu* v. *Third Judge of Small Causes Court, Madras.* (1949) M.W.N. 211=62 L.W. 285=(1949) 1 M.L.J. 471.

Page 111 end of 1st Para: *Shebaitship* as property is quite distinct and separate from the endowed properties of the deity. It is property of a peculiar character and is neither movable nor immovable, agricultural nor non-agricultural. It does not come within the purview of item 21 list 2 seventh schedule of the Government of India Act, 1935. It cannot be said that the Hindu Women's Right to Property Act, 1937 has no application with regard to devolution of *Shebait* rights—*Jagatpat Singh* v. *Krishna Kamini,* A. I. R. (1949) Cal. 373 (B. K. Mukherjea & Ellis, JJ.).

P. 112 end of 1st para: The Bombay Harijan (Removal of Social Disabilities) Act 10 of 1947 is not *ultra vires*; it falls within item 1 of List III of the seventh Schedule to the Government of India Act 1935 and hence it was competent for the Provincial Legislature to pass this piece of legislation. The Act does not fall within item 28 of List II of the 7th Schedule. Nor can it be said that the Governor-General, by giving assent to the Act, by implication constituted this subject as a new subject on which the Provincial Legislature could legislate, though not originally included in Lists II and III, there having been no public notification as required by S. 104, Government of India Act (Chagla, C.J., and Gajendragadkar, J.) *Emperor* v. *Kalidas Amtharam,* 51 Bom. L.R. 100.

Act XXVI of 1943 introducing S. 411-A in the Cr. P. Code, is a valid enactment of the Central Legislature and the appeals (against convictions and acquittals on trials held by a High Court in the exercise of its original Criminal Jurisdiction, notwithstanding anything contained in the Letters Patent of any High Court and without prejudice to the provisions of S. 449 of the Criminal Procedure Code), provided for by S. 411-A of the Criminal Procedure Code were maintainable.

A right of appeal may be a valuable and substantial right and in practice almost equivalent to a rule of substantive law. Nevertheless, in form, it may belong to the category of procedure.

It is reasonable to presume that the framers of the Constitution Act intended to convey by the words " Criminal Procedure " in entry No. 2 of List III concurrent legislative List, in Schedule VII of the Government of India Act, 1935, all that was commonly being treated as part of criminal procedure in the legislative enactments of the Indian Legislature before the date of the Constitution Act.

Entry 15 of List III gives ample power to the Central Legislature to pass Legislation with respect to the jurisdiction and powers of courts, if the provision relating to appeals falls within the entry " Criminal Procedure." Even assuming that the subject-matter of Act XXVI of 1943, does not fall within the words " Criminal Procedure " in Entry 2 of the Concurrent List, it will fall within the words " all matters included in the Code of Criminal Procedure at the date of the passing of this Act " in the same entry. It is reasonable to presume that the matter of providing appeals in criminal cases generally is a matter included in the Code of Criminal Procedure.

The fact that further jurisdiction was superadded to the jurisdiction already possessed by the High Court does not amount to the constitution of a new court so as to bring the subject-matter of Act XXVI of 1943, within Entry 1 in List II in respect of which only the Provincial Legislature had power to legislate.

Legislative authority in respect of criminal procedure would include the power to provide for and affect the right of appeal in these matters. Even if there is any overlapping then under S. 100 (2) of the Constitution Act, 1935, the concurrent list would prevail in so far as a particular subject can be said to fall within entries both in List II and List III.

The resolution of the Governor of the Province (who had assumed to himself all the powers vested in the Provincial Legislature under a proclamation issued under S. 93 of the Constitution Act) approving the bill which was ultimately passed as Act XXVI

of 1943 can be treated as the Resolution such as is referred to in S. 103 of the Government of India Act. (Rajamannar, C.J., Horwill and Rajagopalan, JJ.). *Nathaniel, In re* (1949) M.W.N. 93= (1949) 1 M.L.J. 258 (F.B.).

P. 114, line 3 : Because Hindu Law is applied in the administration of justice by directions of a competent legislature it does not follow that Hindu Law was passed or made by a legislature. The word ' passed ' in S. 311 cannot be read as meaning ' approved or adopted by the Government.' The words can only mean as ' having received the sanction or imprimatur of the legislative authority.' Hence Hindu Law is not an existing Indian law within the meaning of Ss. 107 and 311—*Atmaram Narayan Patil* v. *Emperor,* A.I.R. (1949) Bom. 71 (Chagla, C.J. and Bavdekar, J.).

P. 121 : Footnote Para 2 : Amendments to Ss. 138, 140, 142 : The Government of India (Distribution of Revenues) Order 1949 (21-12-48) enacts that the provisions of articles 3, 4, and 5 of the Government of India (Distribution of Revenues) Order 1948 shall apply in relation to the year ending on the 31st day of March 1950 as they apply in relation to the year ending on the Thirty-first day of March, 1949.

P. 125 end of first para : The tax imposed by the district council of Bhandara by a notification dated 15th July 1937 at the rate of one anna per khandi on persons carrying on the trade of husking, milling or grinding of grains is a tax on professions, trades, callings or employments within the meaning of S. 142-A, Government of India Act, 1935 and is subject to the provisions of the Professions Tax Limitation Act 20 of 1941 which lays down *inter alia* that any taxes payable in respect of any one person to any one district board shall not exceed fifty rupees per annum from and after 1st April 1942 on which date the Act come into force—*District Council, Bhandara* v. *Kisorilal,* A.I.R. (1949) Nag. 190 (Pollock and Hemeon, JJ.).

P. 126, line 4 : Property vested in His Majesty for federal purposes : The ownership of property is not affected by an order of requisition by the Central Government under the Defence of India Rules ; only the possession or enjoyment of the owner is put an end to. Property requisitioned by Government does not vest in His Majesty under S. 154. But additional structures raised by the Government at its cost after the requisition belong absolutely to His Majesty and come within S. 154. The fact that the lands underneath these structures do not belong to Government does not make the structures not the property of Government—*Corporation of Calcutta* v. *Governors of St. Thomas School,* 53 C.W.N. 231 (Mitter and Chunder, JJ.).

Page 135 Line 6 : Section 176 of the Government of India Act, 1935 is merely procedural. If an action lay against Government that action could not be taken away merely because an

identical right of action did not exist, against the East India Company. The Province of Bombay is in direct line of succession to the East India Company. An act of State is different from a sovereign Act. If Government justifies its action under colour of title and that title arises from municipal law that act can never be an act of State. The Bombay Land Registration Ordinance, is a Municipal Law and the Government justifying an order of requisition made under it cannot claim immunity from a Municipal Court. Such an act is not an act of state *P.V. Rao* v. *Khushaldoss S. Advani* (51 Bombay Law Reporter 342) (Chagla, C.J. and Tendolkar, J.)

P. 145, line 22: In *N.W.F. Province* v. *Suraj Narain Anand*, 75 I.A. 343=(1949) A.W.R. 95=(1949) A.L.J. 11 & 15=(1949) F.L.J. 1 A.I.R. (1949) P.C. 112, the Privy Council have held that the provisions of S. 96-B of the Government of India Act, 1919 are mandatory and a rule which purports to give power to a subordinate authority to dismiss in violation of such provisions is invalid and inoperative. The phrase ' conditions of service ' in S. 243 would include provisions which prescribe the conditions under which the employer is to be entitled to terminate the service. The rules of 1937 which authorised such dismissal though valid by reason of S. 243 could not validate the dismissal which was made prior to those rules being printed and published.

P. 153, line 6 from bottom : The Governor of the U.P. appointed the plaintiff who belonged to the provincial police service as officiating superintendent of police. The Secretary of State sanctioned the employment of plaintiff till he retired or till a decision was reached as to the qmestion of his confirmation, whichever was earlier. Plaintiff retired on completing his 55th year without being confirmed. He sued for a declaration that on the date of his retirement he held the legal status and character of a permanent superintendent of police. Held by the Federal Court it was not illegal for the Secretary to State to omit to fill permanently a reserved post and even if there was any illegality the court could not give the relief sought by plaintiff—*Durga Prasad* v. *U.P. Government* A.I.R. (1949) F.C. 50 (Kania, C.J., Fazl Ali, Patanjali Sastri, Mahajan and Mukherjea, JJ.).

P. 191, line 15 from bottom : Article 12 (3) of the Indian Independence (Rights, Property, and Liabilities) Order 1947 made the requisite provision for the continuance of the legal proceedings against the Government after the appointed day but only in respect of any liability of undivided India or a part thereof. The article did not cover proceedings in respect to any right of this undivided India. Ordinance 12 of 1948 was promulgated to remove this defect. Act 38 of 1948, the Continuance of Legal Proceedings Act replaced the ordinance.

P. 168, line 4 from bottom: Salary of Governor-General : From 1st January 1949 the Governor-General agreed with his Council of Ministers to draw a salary of only Rs. 5,500 per month free of income and supertax and Ordinance 4 of 1949, the Governor-General's Salary (Exemption from Taxation) Ordinance gave effect to this agreement. The Act of 1949 enacts the ordinance as a permanent measure.

P. 188, last line : See Government of India (Amendment) Act 1 of 1949, p. 22, footnote 33.

P. 170, line 4 from bottom: See Government of India (Amendment) Act 1 of 1949, p. 22, footnote 33.

Appendix B.

Sandur and Banganapalli have become centrally administered areas. A greater Rajasthan Union has been formed with the addition of states like Jaipur, Jodhpur, etc. Kolhapur has merged with Bombay Province on 1-3-49. Baroda has merged with Bombay Province from 1-5-49. Travancore and Cochin have been integrated from 1-7-49. Bhopal and Rampur have bcome Chief Commissioner's Provinces from 1-6-49. Kashmir has sent representatives to the Constituent Assembly. The Government of India has taken over the administration of Sikkim. Chandernagore has voted for union with India by an overwhelming majority.

PRINTED AT THE MADRAS PUBLISHING HOUSE (1945) LTD. MADRAS 2.